IN THE

SUPREME COURT OF THE UNITED STATES

August Special Term, 1958

No. 1

WILLIAM C. COOPER, et al., - - - - - - - - - - - - - - - - - - PETITIONERS,

v.

JOHN AARON, et al., - RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on August 18, 1958.

Opinions Below

The opinion of the Court of Appeals is as yet unreported. It and the District Court opinion are abstracted in the appendix to Respondents' brief filed prior to the August 28 hearing.

Jurisdiction

The judgment of the Court of Appeals was entered August 18, 1958. On August 28, 1958, by order of this Court, the Petitioners were given leave to file petition for a Writ of Certiorari not later than September 8, 1958. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

The District Court found that the school board's plan of desegregation has resulted in severe impairment of the educational program and an over-all intolerable situation because of overt resistance and opposition by the state government, students, parents, organized groups, and segments of the community. The questions presented are:

(1) Whether a court of equity may postpone the enforcement of the respondents' constitutional rights if the continued enforcement thereof will result in an intolerable situation and great disruption of the educational process to the detriment of the public interest, the schools, and the students including the respondents.

(2) Whether a school district has a duty and obligation, by invoking extraordinary legal processes and otherwise, to quell violence, disorder and organized resistance to desegregation.

Constitutional Amendment Involved

Amendment 14 to the Constitution of the United States, Section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

Little Rock School District, hereinafter referred to as "the District", after the first Brown decision and before the second Brown decision, evolved a Plan of Integration. The good faith of the District has never been challenged. The Plan contemplated integration in the senior high schools of the District during the 1957-1958 term, later in the junior high schools, and still later in the grade schools. It was assumed that within a period of seven years integration would be complete.

The NAACP was not satisfied with the Plan or the time schedule and caused a suit to be filed contending that complete integration should be required overnight. The District Court and the Circuit Court of Appeals approved the seven year plan. See Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark.); 243 F. 2d 361 (C.C.A.8th).

The District commenced functioning under the Plan in September, 1957, and it operated during the 1957-1958 term with disastrous results. With an experience which taught the futility of compliance without sacrificing those values uppermost in the minds of educators, the District filed a Petition asking that the District Court, in the exercise of its discretion, postpone operations under the Plan for a period of two and one-half years. On undisputed testimony as to what had happened, the District Court concluded that the education of all pupils was being harmed and in the public interest an interruption in the desegregation plan should be permitted.

The District Court expressly found, among other things, that there were acts of destruction and threats of destruction; that tension and violence occurred among students leading to more than 200 suspensions and expulsions; that the State has acted in opposition to the process of integration; that the community and the press have condemned the principle of integration, abused the school officials and federal authority, and announced that integration could be avoided; that teachers and school officials were exhausted, tense, frustrated, and apprehensive in the face of threats; that normal enforcement processes were inadequate to cope with the situation and troops or the equivalent would be necessary again; that education has suffered and will continue to suffer; that there was chaos, bedlam and turmoil from the beginning; that the situation is intolerable.

In addition to these findings, other factors are revealed in the record. Many of the mob participants were identifiable but none were charged by federal law enforcement agencies. The pupils who became involved in disciplinary investigations were being guided by adults. The F.B.I. made a full report of the situation; the Department of Justice has not seen fit to make this report available to the school board. Nor was the report utilized by the Department of Justice since it publicly dropped plans to prosecute agitators. The legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements villifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace.

On the basis of its findings, the District Court held that the request for a postponement was made in good faith and was manifestly justifiable; that severe impairment of the educational program and of the welfare of the students and the community would result were the postponement not granted; that the inherent powers of equity

and the spirit of the second Brown decision dictated that the school district be allowed to operate its school on a segregated basis for a time without being considered in contempt of court.

The Circuit Court of Appeals for the Eighth Circuit agreed with the findings of the District Court that the evidence is appalling but that great additional expense disruption of normal educational procedures, tension and nervous collapse of the school personnel, turmoil, bedlam, and chaos, are not a legal basis for suspension of the plan since this would be an accession to the demands of insurrectionists.

Reasons for Granting the Writ

The tremendous importance of the questions presented by this case is manifest. To this point little can be stated that would not be merely cumulative to the arguments expressed in the petition for writ of certiorari previously made, the application to vacate the stay granted by the Circuit Court of Appeals, the response to that application, the oral argument directed to the application to vacate, the briefs filed by amici curiae, and the certified record heretofore lodged with theCourt.

This case calls for a decision more far reaching, studied and comprehensive than the superficial treatment accorded the matter in the Circuit Court of Appeals. Negro children claim that their right to attend unsegregated schools is violated by the District Court judgment. But no one contends that the Little Rock School District has denied to the children their constitutional rights under the Brown decisions. Rather, the action offensive to the Fourteenth Amendment to the Constitution of the United States is mass opposition to integration by the people of the state and obstruction by the state itself.

Whatever the answer may be, it certainly is not to simply return the school district to the bedlam, turmoil, and chaos which has been destroying the school district and has emasculated the educational program.

The argument of petitioners is reflected by the questions presented. First, where a school board has made a prompt start toward desegregation and has continued throughout to exercise good faith, severe impairment of the educational system both present and prospective because of desegregation entitles the school district to a postponement regardless of the source and motivation of the destructive forces. The second Brown decision was so construed by the District Court.

If the Brown rule is not sufficiently flexible to allow time for the subsidence of forces such as are arrayed here against it, then it may be seriously doubted whether courts are able to effectively cope with "state action" such as this, and perhaps this Court should so hold. Certainly the legislative and political departments of the United States government have displayed little willingness to assist in the implementation of the Brown decisions, although the matter would seem to rest more appropriately in those departments where obstruction by the governor and legislature and mass opposition by the people of a state is concerned.

Even though this is an area which courts have often shunned for lack of practical power to act, the Circuit Court of Appeals has suggested that the duty of resisting the concerted opposition of the state and its populace lies with the school district. Certainly the responsibilities of defendant school districts should be clarified and delineated by this Court.

And finally, denial of relief to the school district will have a profound effect over the nation. There are thousands of school districts that have not made a step toward desegregation. In their repose these districts are conducting educational programs without harrassment of any sort albeit constitutional rights declared by the Brown decisions are being violated. Thus it would be the height of irony if the Little Rock School District, having made the start in good faith, were denied this postponement at the expense of the entire educational program at the high school level. The attorneys for the respondents have, at every stage, tacitly conceded the existence of the situation as found by the District Court, but have ignored and skirted the equities of the school district and of the thousands of students, parents and teachers. Affirmance of the Circuit Court of Appeals, or denial of this petition for writ of certiorari, would discourage any further voluntary compliance by school districts with the Brown decision.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF FOR THE PETITIONERS

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JURISDICTION

The judgment of the Court of Appeals was entered August 18, 1958. On August 28, 1958, by order of this Court, the Petitioners were given leave to file petition for a Writ of Certiorari not later than September 8, 1958. The petition was filed September 8, 1958. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The District Court found that the school board's plan of desegregation has resulted in severe impairment of the educational program and an overall intolerable situation because of overt resistence and opposition by the state government, students, parents, organized groups, and segments of the community. The questions presented are:

(1) Whether a court of equity may postpone the enforcement of the respondents' constitutional rights if the continued enforcement thereof will result in an intolerable situation and great disruption of the educational process to the detriment of the public interest, the schools, and the students including the respondents.

(2) Whether a school district has a duty and obligation, by invoking extraordinary legal processes and otherwise, to quell violence, disorder and organized resistance to desegregation.

CONSTITUTIONAL AMENDMENT INVOLVED.

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STATEMENT

Little Rock School District, hereinafter referred to as "the District", after the first *Brown* decision and before the second *Brown* decision, evolved a tentative Plan of Integration. The good faith of the District has never been challenged. The Plan contemplated integration in the senior high schools of the District during the 1957-1958 term, later in the junior high schools, and still later in the grade schools. It was assumed that the plan would require a period of about seven years.

The NAACP was not satisfied with the Plan or the time schedule and caused a suit to be filed contending that complete integration should be required overnight. The District Court and the Circuit Court of Appeals for the Eighth Circuit approved the seven year plan. See *Aaron* v. *Cooper*, 143 F. Supp. 855 (E.D. Ark.); 243 F. (2d) 361 (C.C.A. 8th).

The District commenced functioning under the Plan in September, 1957, and it operated during the 1957-1958 term with disastrous results. With an experience which taught the futility of immediate operation of the plan without sacrificing those values uppermost in the minds of educators, the District filed a Petition asking that the District Court, in the exercise of its discretion, postpone operation under the Plan for a period of two and one-half years. On undisputed testimony as to what had happened, the District Court concluded that the education of all pupils was being harmed and in the public interest an interruption in operations should be permitted.

Among the express findings of the District Court, as contained in its Memorandum Opinion, are the following:

"There were many incidents within the school consisting of slugging, pushing, tripping, catcalls, and abusive language.

"There was tension among the students and teachers which resulted in the lowering of the standards of education.

"Teachers were physically exhausted and frustrated.

"On forty-three occasions there were threats that the school building would be destroyed by dynamite. Each threat necessitated the searching of the premises.

"School property was destroyed by acts of vandalism and school funds were expended for replacements which necessitated reducing expenditures for necessary maintenance.

"200 pupils were suspended and two were expelled.

"Extra-curricular school activities were diminished.

"Troops moved around and within the school building distracting the pupils from their school work.

"There was 'chaos, bedlam and turmoil' from the beginning.

"Newspaper articles and circulars have been published and distributed condemning the principle of integration, abusing the school officials, and telling the residents of the district that integration could be avoided.

"School officials were threatened with violence.

"A serious financial burden has been cast on the District in coping with the problems encountered.

"The State of Arkansas, instead of bringing its laws into conformity with the rule of *Brown* v. *Board of Education*, has adopted a constitutional amendment and enacted several statutes which destroy in various ways the process of integration.

"Education has suffered and will continue to suffer.

"The Police Department of Little Rock is unable to furnish adequate protection.

"Federal troops will be required again next year.

"The situation is intolerable."

Although not mentioned by the District Judge, the record reveals other conditions which added to the intolerability of the situation:

Mobs formed and overtly interfered with operations under the Plan. Some were arrested by the City Police but later discharged.

Vicious circulars were distributed condemning the District Court, the Supreme Court of the United States and the school officials who recognized the supremacy of Federal Law.

Masters of rhetoric were imported who told the residents of the District that the Governor of Arkansas could legally prevent integration and suggested that the shedding of blood was permissible in order to maintain segregation.

Many of those who formed into mobs were identifiable, but none has been punished by the District Court or any Federal law enforcement agency.

Some of the Negro pupils who were abused made reports to the United States District Attorney. The Attorney General of the United States made a public statement to the effect that no one who had interfered with operations under the Plan would be prosecuted.

A columnist writing for one of the local papers constantly supports the doctrine that the Fourteenth Amendment was not legally adopted and that the decision of this Court in *Brown* v. *Board of Education* is not the law of the land.

Vulgar cards, critical of the school officials, were given by adults to school children for distribution within the school building.

Pupils who became involved in disciplinary investigations are being guided by adults.

The Federal Bureau of Investigation made a full and comprehensive report of the Little Rock situation, and although the school officials discussed with the F.B.I. several times the matter of using the report to arrive at a decision as to feasibility of the use of injunctive measure, the report was not made available to them, nor was the report utilized by the Department of Justice since it dropped plans to prosecute agitators.

The legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements villifying Federal law and Federal courts, and failing to aid enforcement through judicial processes.

On the basis of its findings, the District Court held that the request for a postponement was made in good faith and was manifestly justifiable; that severe

impairment of the educational program and of the welfare of the students and the community would result were the postponement not granted; that the inherent powers of equity and the spirit of the second *Brown* decision dictated that the school district be allowed to operate its schools on a segregated basis for a time without being considered in contempt of court.

The Circuit Court of Appeals for the Eighth Circuit agreed with the findings of the District Court that the evidence is appalling but that great additional expense, disruption of normal educational procedures, tension and nervous collapse of the school personnel, turmoil, bedlam, and chaos, are not a legal basis for suspension of the plan since this would be an accession to the demands of insurrectionists.

SUMMARY OF ARGUMENT

The argument of petitioners is reflected by the questions presented. First, where a school board has made a prompt start toward desegregation and has continued throughout to exercise good faith, severe impairment of the educational system both present and prospective because of desegregation entitles the school district to a postponement regardless of the source and motivation of the destructive forces. The second *Brown* decision was so construed by the District Court.

There are thousands of school districts in the South that have not made a step toward desegregation. In their repose these districts are conducting educational programs without harrassment of any sort albeit constitutional rights declared by the *Brown* decisions are being delayed. Thus it would be the height of irony if the Little Rock School District, having made the start in good faith, were denied this post-

ponement at the expense of the entire educational program at the high school level. The attorneys for the respondents have, at every stage, tacitly conceded the existence of the situation as found by the District Court, but have ignored and skirted the equities of the school district and of the thousands of students, parents and teachers. Moreover, it is the judgment of the District Court and the school board that the respondents' best interests would be served by enrolling them on a segregated basis, and no one is in a better position to determine this.

The Solicitor General, in his argument before this Court on August 28, 1958, stated that a court of equity does not ask people to do things that are beyond their power. He agreed that the school board has had a difficult time of it. He further stated that in his opinion the *Brown* decision does not extend to destruction of institutions in order to grant private rights. Apparently the position of the Government is that if the school board had done everything possible and still the merits of the case called for a stay, then the granting of it would be reasonable; but that the school board could have done more and that the situation is difficult but not impossible. This would seem to be a substitution of judgment for that of the school board and the District Court.

The Circuit Court of Appeals and this Court should not substitute its judgment for that of the District Court unless it is obviously without foundation in fact. Here the school board determined and the District Court found that maintenance of educational standards was impossible under the circumstances. There was ample evidence in support of this determination, and the District Court further found

that the school board and personnel had done all they could to prevent total disruption of the schools.

It is to be questioned whether a court has the practical power to deal with opposition such as is here encountered. But if it does, certainly the method should not be that of placing the school board in the undeserved position of being the sole bastion of Federal authority until it destroys itself. It may be that mass violent opposition can be dealt with through the District Court with the assistance of the Department of Justice and the respondents, but until unlawful force, violence and official state resistance subside through passage of time or as a result of the exercise of the powers of the judicial processes, the school district must be allowed its requested postponement.

Finally, the respondents and the Solicitor General have argued, and the Circuit Court of Appeals has suggested, that the school board was obligated to pursue the forces of violence arrayed in the community. This the school board cannot do, and this should not be expected of it. The school board is dedicated only to furtherance of the educational program and adherence to law and order. It is under compulsion of court order to desegregate, but it is not and should not be a militant combatant of segregationist forces. Rather, this should be an obligation of the respondents and the Department of Justice, neither of whom has acted.

ARGUMENT

I

The decision of the District Court is in the public interest and is in accord with the spirit of the second Brown *decision.*

The District Court found that continuation of desegregation in the immediate future would place the District in an intolerable situation. It found that the educational program was being, and would continue to be, greatly impaired and endangered to the detriment of the public. It further found that the District had done all it could toward alleviating the situation. Findings of fact by lower tribunals are not lightly disturbed. Especially should these findings of fact, based as they are upon overwhelming evidence, be unassailable in the light of the *Brown* decision. The determination of the reasonableness of the time and manner in which a school district implements the prescriptions of the *Brown* decision rests in the sound discretion of the local District Judge. Virgil Blossom, Superintendent of the District, gave his interpretation of "all deliberate speed" couching it in terms of the history of the Negro in this country and the present considerations of maintenance of educational standards and the public interest (R.295-299):

Q. Did the term used by the United States Supreme Court, "deliberate speed", gain your attention and did you try to determine what was meant by it?

A. Yes, sir, very materially, to this extent, Mr. Butler. The Negro as a race came to this country in 1619. They came in chains, as slaves. They stayed in that, and, as far as I could study

it, you would class that as the first period in the history of the United States, and they stayed from 1619 until 1865, which is nearly two and three-quarters centuries, and that is one period in their march for civil rights of their development. The second period began in 1865 and they stayed in this second period until 1896 when we had *Plessy* v. *Ferguson*. That is 31 years. Now, in this period they had their freedom. They did not have economic or political or any other type of position to any extent. Then coming out of that period into what I would call the third one, from 1896 until 1954, and I would just label that separate but equal. Now, they stayed in that 58 years, and when you look at the problems and the complexities in this thing and recognize that many places separate but equal is no way near a reality. Many places in the Southland they still do not approach separate but equal, but in Little Rock, Arkansas, they did. I am not arguing the separate but equal philosophy. I am trying to state what history tells us in terms of a two and a half year request for delay, and that is the third period, and when we account for the fact that there are three periods, one taking nearly three centuries, another 31 years and another 58 years, and recognizing that there is one group that says we are going to have it all now and another that says we are never going to have it, you put the horns of the dilemma in proper perspective with the School Board right in the middle, and it is a difficult thing; and then you come to May 17, 1954, and we look at it today, June 4th, 1958, and you compare that period of time as compared to either one of the previous three periods I have outlined, and you wonder how fast, in terms of history, anyone can expect a change in cultural patterns, and you have to ask yourself, well, this district which was actually separate but equal, and could so be defended prior to May 17, which

has nothing to do with this, except in terms of the two and a half year delay. In view of what we know has happened this year, it just magnifies and intensifies the problem, and in terms of that period of time that I have outlined it is a very small segment compared to either one of the previous three periods and, at the same time, when we look at the slowness with which local laws are being moved out of the way by courts, and state courts in this instance, if you please, the problem is certainly magnified, and I would not be smart enough to say that two and a half years, or three and a half, or two, is a long enough period of time.

But when you look at it in terms of the time required to change cultural patterns, the slowness with which local laws are moved out of the way, and recognize that the fact that the Court spelled out in its "all deliberate speed" philosophy, certain logical legal reasons for delay, one of which is "local laws". It tells me that the Court anticipated the fact but they made a mistake. They anticipated that local and state governments would voluntarily fall in line and move those laws out of the way, but to me the Supreme Court was in error in their judgment. Southern states have not done that. Instead of moving them out of the way, daily they are creating more, which adds to this dilemma, and until that has happened, it seems to me that history spells out exactly what the Supreme Court meant by "all deliberate speed", and it spells out to me a varied studied judicial approach that each place is different and it may be different this year than last year or it may even be next, but they recognize it, and public interest is another thing, and I am sure that they have no idea of down-grading anybody's educational program. Now all of that was considered very deliberately and judiciously in terms of asking for two and a half years, and when you look

> at the size of the problem involved and look at what history seems to tell us, then two and a half years looks like a very short time to me.

In the second *Brown* opinion (349 U.S. 294), with respect to the spheres in which school districts and the District Courts should operate, this was said:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

The mores of the people in the realm of law enforcement are powerful. In the Appendix we have quoted from "Folkways" by William Graham Sumner and articles by Ruppert Vance, Wiley H. Davis and W. E. Gauerke and Mozell Hill which appeared in the *Journal of Public Law*, Emory University Law School, Vol. 3, No. 1, Spring, 1954, Edition.

As a rule laws follow the crystallization of the mores. In that pattern law enforcement is easy, as public sentiment approves enforcement. When laws are in advance of the mores, then in order to have effective enforcement there must be (a) an ability to understand the purpose of the law, a well developed sense of self-discipline, and a willingness to cancel an existing attitude for societal benefits; or (b) the government which creates the new law which is not in step with the mores must, by an application of compulsive power, be able to force the people to accept its principle regardless of their attitudes. If both conditions for enforcement are lacking, the results are bound to be

turmoil, recalcitrance, and a rapidly developing disrespect for all law.

The mores are different in different places, the variation being due to the environments under which they develop. The *Brown* decision is more or less apace with the mores in some of the northern states. In the southern states it was far out in front, and its rule has provoked wide-spread and intense hostility to the members of the Negro race, the Supreme Court of the United States, the Federal Government, and all school officials who believe it is their duty to carry out its mandate. Judge Reeves who presided in *Hoxie School District* v. *Brewer*, 137 F. Supp. 364 (E.D. Ark.), was aware of the actuality of the problems springing from the mores. He said:

> "Judges should not be unmindful of the customs, mores and sentiments that may have existed among people and in communities over a long period of years and that a sudden overturning or reversal of such habits and customs by an apparent outside force or authority would at first blush be provocative. Under such circumstances logic, and not emotion, should dominate and prompt action. If the change is proper and just, then all should submit without delay. If it be deemed unjust and improper, then orderly processes should be observed to reestablish the custom."

It seems to us that the language in *Brown* shows an awareness of the probable development of difficulties and insistence that the remedy of enforcement was to be kept flexible so as not to place the District Courts in the position of ordering what they could not enforce. Reference is made to the "varied local school problems". When a school district grapples with one of the problems, the courts will have to determine whether

it is acting in good faith. In most instances good faith can be determined by answering the question as to whether the problem is real or imaginary. It is said that "once a start has been made" additional time may be requested to carry out the ruling in an "effective" manner. Here a start was made. Due to conditions beyond the control of the District, its efforts effectively to integrate have been thwarted. What is the meaning of the word "effective" as used in the opinion? Is effectiveness to be tested only by the speed with which Negro pupils are enrolled in integrated schools or does the word connote a transition which will give to the Negro pupils their constitutional rights with as much speed as is reasonably compatible with the preservation of the existing standards of public education.

In the case of *Cumming* v. *Board of Education*, 175 U.S. 528, 544-545, Justice Harlan denied an injunction because "the result would only be to take from white children educational privileges enjoyed by them, without giving colored children additional opportunities for the education furnished in high schools." In the Little Rock situation, the negro students' high school education will not be interrupted and in fact they will be spared the predictable mental torment and physical danger that would accompany attendance at Central High School at the present time. On the other hand, Judge Lemley's decision is not reinstated, the school board for the reasons reflected in the findings of the district court will be unable to operate Central High School on an integrated basis under conditions as they now exist in Little Rock. Perhaps the matter of greatest importance will be the irreparable harm done to the education of 2,000 stu-

dents at Central High School and more than 21,000 students throughout the Little Rock School District.

It is said that the courts may consider problems relating to "administration . . . arising from the . . . revision of local laws . . . which may be necessary in solving the foregoing problems." The revision there contemplated was one which would conform local laws to the rule of *Brown*. Here the revision has gone in reverse of what was intended. Amendment 44 to the Constitution of Arkansas was adopted in 1957. It commands the General Assembly to oppose by every constitutional method the "unconstitutional decision of *Brown* v. *Board of Education*." As ludicrous as its language may appear to this Court from a legal standpoint, it illustrates the spirit in which the suggestion to revise has been accepted. The following statutes have been enacted or adopted by the people to impede the process of integration:

> The Pupil Assignment Law, Sections 80-1519 to 80-1524, Arkansas Statutes (1947).
>
> No compulsory attendance, non-segregated schools, Section 80-1535, ib.
>
> Employment of legal counsel to resist integration, Section 80-539, ib.
>
> Sovereignty Commission, Section 6-801, ib.

At its special session commencing August 26, 1958, the Arkansas legislature passed a raft of bills which allow the governor to close schools integrated by court order where there is some opposition; allow transfer of students from integrated schools to segregated schools as a matter of right; allow attendance at segregated classes if desired and as a matter of right; permit retaliation against school boards by means of

recall; and so forth. The governor has not yet signed the bills.

The heart beat of the educational system is found in the area of administration and the opponents of integration, realizing this, aim at the disruption of the administrative department. Administration is concerned with teacher qualifications, finances, protection of school property, discipline, pupil responsiveness, scholastic opportunities, etc., etc. If a timely revision of local laws was by this Court considered an important factor, surely the twisted revision which has occurred in Arkansas was a factor to be considered by the District Court in determining whether the plan first adopted was workable and, if not, whether a reasonable modification was appropriate.

Unable to predict what problems would arise, this Court said the rule of equity should be applied in integration suits. From the opinion:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and *by a facility for adjusting and reconciling public and private needs.* These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools *as soon as practicable* on a nondiscriminatory basis. To effectuate this interest *may call for elimination of a variety of* obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the *public interest* in the elimination of such obstacles in a systematic and effective manner (emphasis supplied).

Having said that the principles of equity are to control and that "practicable flexibility" in the adjusting and reconciling of public and private needs is one of the traditional functions of equity, we assume this Court meant that those tests should be applied not only at the start of integration but throughout its entire course and until the supervisory jurisdiction of the particular court is ended with a completely integrated school system. To argue that because a start is made the District is frozen to the original schedule which, due to the development of unanticipated conditions, is found to be no longer practical is to do violence to any reasonable concept of flexibility.

The phrase "with all deliberate speed" repels any idea of precipitancy in total disregard of the consequences. The following is taken from "Desegregation and the Law", a book written by Albert P. Blaustein and Clarence Clyde Ferguson, Jr. (1957), members of the faculty of Rutgers University Law School:

> "No words in the school segregation cases have created more confusion or caused more comment than the simple phrase, 'with all deliberate speed'. Yet, vague as these words may appear, they were not tossed carelessly into the 1955 opinion just to improve literary style or sentence structure. On the contrary, as Justice Minton told the press shortly before his retirement, these words were the result of 'long and careful consideration'. Embodied in the phrase 'with all deliberate speed' is a definite rule of law. But it is a peculiar rule of law in that it is designed to permit so much flexibility in its application. It is a rule which causes decisions to vary from court to court and from case to case. And it was for precisely this reason that it was employed in

Brown v. *Board of Education.* 'With all deliberate speed' *was utilized as a term of art, empowering the lower courts to adjust the impact of the decision in light of local governmental conditions*" (pp. 218-219) (emphasis supplied).

Here the District Court was acting within the area of permissive discretion when the impact of the *Brown* decision was adjusted in the light of local governmental conditions.

II

EFFECT OF OPPOSITION BY COMMUNITY AND BY STATE GOVERNMENT

It is the position of the District that where the educational program is imperiled and greatly impaired because of the current operation of a plan of desegregation, then in the public interest it is entitled to suspend for a time the operation of schools on an integrated basis. The nexus of the District's case is the practical impossibility of continued operation on a desegregated basis. The motives and actions of third parties are not material to the question of whether or not the Little Rock school system should be effectively destroyed by court order.

To illustrate, let us suppose that a drayman is ordered by a court to proceed from town A to town B. In transit he must pass over a bridge spanning a chasm. The bridge is destroyed before he can traverse it. The bizarre position of the Circuit Court of Appeals and the Respondents is that if the bridge is destroyed by accident or somesuch probably the drayman should be allowed to halt his journey until reconstruction of the bridge; but if the bridge is maliciously destroyed by a third party in order to frustrate the orders of the Court, then the drayman

must be forced to plod on his journey and over the brink of the chasm to his fate.

The Solicitor General has made substantially the same argument as that of the Respondents, leavened, however, by the concession that institutions may not be destroyed in order to enforce private rights. In fact the District comes within the scope of the latter premise, and the District Court so found. The remainder of the brief of the Solicitor General is directed to responsibility for enforcement and to an effort to go behind the findings of the District Court and argue the facts. To traverse these questions of fact would unnecessarily lengthen the brief but two misstatements should be corrected. On page 15 of the Solicitor General's brief it is stated that the active instigators are limited in number. To the contrary, they are legion; they represent the great mass of the people and the state government as well. And on page 17 it is stated that only twenty-five students were interfering with the plan. In fact more than two hundred students were suspended and many more were not apprehended.

The equities of the public, the students, and the District have been hastily dismissed by the Circuit Court of Appeals and the Respondents. But this is the foremost consideration for to do otherwise in this situation would be to establish a policy of consigning the handful of southern school districts conforming to law and order to the role of martyrdom on the public altar.

The several cases discarding public opposition as a ground for postponement have no relevance to this situation for only a threat existed, not devastating

results. It is the results and consequences that entitle the District to relief.

The District Court, in its opinion, said:

> "The opposition to integration in Little Rock is more than a mental attitude."

In that terse finding the rule of *Jackson* v. *Rawdon*, 235 F. 2d 93 (C.C.A. 5th), and its followers is set apart and catalogued as one which has application only in the preliminary stages of a judicially enforced integration. Nathaniel Jackson and others filed suit against a Texas school district in 1955. At the hearing the school officials offered only alibis which showed conclusively that there were no administrative problems confronting them. The following excerpts are taken from the opinion:

> "* * * plaintiffs' claims by developing that there were no administrative difficulties which had to be overcome in order to admit the plaintiffs to the Mansfield High School but only, as clearly shown by the testimony of R. L. Huffman, the superintendent, a difficulty arising out of the local climate of opinion, requiring the board, in its opinion, to discriminate against plaintiffs by denying them access to the only high school in Mansfield, while permitting white children to attend it. * * *
>
> "We think it clear that, upon the plainest principles governing cases of this kind, the decision appealed from was wrong in refusing to declare the constitutional rights of plaintiffs to have the school board, acting promptly, and completely uninfluenced by private and public opinion as to the desirability of desegregation in the community, proceed with deliberate speed consistent with administration to abolish segregation in Mansfield's only high school and

with no concern whatever as to whether their course will end in frustration and a further wasting away of respect for national law. The District Court could see far beyond the horizon of the negro students. There are visible rights other than those of immediacy in integration. The public interest is involved, and it was thought best to adjust and balance rather than apply the over simplified syllogism that this Court having said the Negro pupils are entitled to some rights, it therefore follows that any retardation in granting those rights, regardless of the reason, is unreasonable.

There is no questioning of constitutional rights in a short delay. Those rights are recognized. In a temporary postponement of the time for the exercise of those rights, based on sound reason, there is no intimation of a lowering of status. A reasonable postponement is in the nature of an adjustment wisely required for the better protection of the very rights which are asserted. That is the rationale of the District Court's decision. As a rule, education is far removed from the controversial areas of government. No one would think of a school district as being equipped to enforce a law which is objectionable to those who supply the funds with which the District is operated, and yet that seems to be one of the basic ideas of appellant. The petitioners quite candidly told the District Court they did not look upon such enforcement as being a duty and they felt it would be improper for the District, which is tax supported and whose revenues are limited, to expend its funds in perpetual litigation and prosecutions. Surely there is no federal law which could possibly impose upon a local school district any kind of a mandate which would force it to use its revenues, not for educational

purposes, but for compeling obedience on the part of others to federal laws.

Mobs formed preventing entry of the Negro pupils and screaming insults upon the Police Department, school officials and the Federal Court. Arrests were made by the police, but the offenders were discharged by the judge who presided over the Municipal Court. There was not a single prosecution by the Federal Government. There was not a single citation for contempt, although many of the participants were identifiable. A spokesman for the Department of Justice, in an effort to impress upon the Governor of Arkansas the importance of maintaining law and order through State action, explained the difficulties of Federal enforcement. Thereupon the Governor revealed through the press the existing weakness in Federal enforcement and this, as intended, gave impetus to the deliberate flouting of the federal law. The FBI made an investigation and it is to be assumed that it identified the ring leaders. The local papers contained pictures of Negro pupils going into the office of the United States District Attorney to make complaints. Nothing happened. Then came a front page announcement in jumbo type that the Attorney General of the United States would not prosecute any of those who had taken part in the unlawful demonstrations.

We are not in the least critical of the Department of Justice. As a matter of fact, we believe its staff has shown a high degree of competence and zeal in the Hoxie case and in the action to restrain the use of Arkansas National Guard in preventing Negro pupils from entering Central High School. The brutal fact is that the Department of Justice has only few and inadequate legal implements it can use in punishing

those who directly or indirectly defy the Federal Court order of integration. This fact having become obvious, the agitators are emboldened and they go to further extremities in placing their individual ideas of law above any disagreeable judicial decision.

The problem of enforcement is forcefully pointed out in the book, "Desegregation and the Law", by Albert P. Blaustein and Clarence Clyde Ferguson, Jr. (1957), members of the faculty of Rutgers University Law School. It is there pointed out that severe doubts exist as to the constitutionality of Sections 241 and 242 of Title 18, United States Code. *United States* v. *Williams*, 341 U.S. 70; *Screws* v. *United States*, 325 U.S. 91. And it is further pointed out that the contempt power is limited by the requirement of certainty when dealing with broad desegregation orders and by its inherent inadequacy in coping with community disrespect for federal law.

In an article entitled "Negro Citizens in the Supreme Court of the United States", 52 Harvard Law Review (1939), at page 832, this is found:

> "It is impossible in reviewing these decisions to avoid the conclusion that the Supreme Court, until recently at least, has been no great friend to the black man. There are those who believe that it could have done no more with a nonrational problem packed with sectional dynamite. Legislation running counter to emotions rising to a religious pitch is likely to require bayonets rather than equity decrees to enforce it. The Court is not well equipped to deal with a conspiracy by a whole state; and, when Congress has for so long been reluctant to interfere, it is not surprising that the Court should refrain from interfering with state policy."

The author cites *Giles* v. *Harris*, 189 U.S. 475. In the opinion Mr. Justice Holmes had this to say:

> "The other difficulty is of a different sort, and strikingly reinforces the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights, and also the suggestion the state constitutions were not left unmentioned in Sec. 1979 by accident. In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. This is alleged to be the conspiracy of a State, although the State is not and could not be made a party to the bill. *Hans* v. *Louisiana*, 134 U.S. 1. The Circuit Court has no constitutional power to control its action by any direct means. And if we leave the State out of consideration, the court has as little practical power to deal with the people of the State in a body. The bill imports that the great mass of the white population intends to keep the black from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. *Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States* (emphasis supplied).

Counsel for appellants asked witnesses for the District why they did not institute proceedings against those who interfered with the operations of Central

High School as was done in *Kasper* v. *Brittain* 38, 245 F. 2d 92 (C.C.A. 6th), and *Brewer* v. *Hoxie School District*, 238 F. 2d 91 (C.C.A. 8th). The reasons are obvious. In the *Kasper* case, only Kasper himself was involved. He fomented the strife. The school officials asked for a restraining order. It was entered and ignored. Kasper was then adjudged to be in contempt and brought before the court with an order of attachment. From that point on it was the presiding judge and not the school officials who placed Kasper in the federal penitentiary.

In the *Hoxie* case (137 F. Supp. 364), there were only four defendants, to-wit, Brewer, Guthridge, Johnson and Copeland. The results of the agitation they had created involved the personal safety of the school officials and many others. The officials, aided by the Attorney General of the United States, sought an order of injunction. The latter had come in as *amicus curiae*. He filed an exhaustive brief in the Court of Appeals, and we are sure he was mainly responsible for the results of the litigation.

It seems inconsistent to us that counsel employed by NAACP contend that a school district sustained by tax funds should assume the burden of prosecuting those who interfere with the District's efforts to comply with the terms of the Plan. NAACP is an organization created for the very purpose of establishing and then enforcing constitutional rights of Negro pupils. It has a most capable legal staff and adequate funds. The idea of transferring to the School Board the burden of prosecuting violators of the Court order is as strange as the idea of requiring a defendant who has been cast in damages to issue the process that will consume his assets in order that the plaintiff's judgment may be satisfied.

It is true that in *Thomason* v. *Cooper*, 254 F. 2d 808 (E.D. Ark), the District applied to the District Court for an injunction against the use of a State court order which would have compelled it to violate the District Court's order. That, however, was no indication of a willingness to assume the role of public prosecutor. As stated by Judge Sanborn, the District was between the "upper and the nether millstone".

The District officials respect their oaths to support the Constitution of the United States and they have done so to the best of their ability. Now they have concluded that a sincere effort on their part is not enough. They have practiced no strategy of evasion. They have made no move without asking approval of the Federal Court. Their attitude from the start has been one in which law and order along with their primary function of maintaining a public school system have priority.

In *Faubus* v. *United States*, 254 F. 2d 797 (C.C.A. 8th), the Federal Government had the power to act, and it exercised such power with swiftness in putting a stop to an unlawful defiance of a Federal Court order. A school district, however, which functions only in the field of education, is not as formidable an adversary as the United States of America.

Respondents quote from the *Faubus* case as follows:

> "* * * A rule which would permit an official whose duty it was to enforce the law, to disregard the very law which it was his duty to enforce, in order to pacify a mob or suppress an insurrection, would deprive all citizens of any security in the enjoyment of their lives, liberty, or property (p.33).

to put into effect desegregation there" (pp. 94-96).

The District was never dominated by private or public opinion. It received criticism from both avid integrationists and segregationists from the beginning, but it steadily went forward. There has been only one pause, and that was justifiable in the thinking of any rational human. When the Governor of Arkansas unexpectedly surrounded Central High School with troops in order to prevent the entry of Negro pupils, the situation was bristling with danger and solely to prevent injury to the Negro pupils the District caused a notice to the published in a local paper requesting them not to attend on the opening day. That decision was made late in the night. The next day the District, by petition, reported its action to District Judge Davies, in Arkansas on temporary assignment, and asked whether the notice should be rescinded. The District Court ordered that it be rescinded, and it was rescinded. A little later, when mobs were milling about the school premises, tension had almost reached the breaking point and a race riot was in the making, the District asked for a "temporary" postponement until calmness could be restored, pointing out in its petition that it was impossible to teach in an environment of such turmoil. Judge Davies labeled the petition and the proof as being "anemic", and that utterance did much to increase the difficulties of the District. The District continued its efforts to operate an integrated school, and at last it concluded that conditions were such that it should again ask the Court to decide whether operations under the Plan should be continued, and it then filed the petition which is here under consideration. This District has never declined to go forward. It has submitted its proof to a Federal Court, and

that Court, in the exercise of its discretion, has said that under existing conditions the District should not be required to proceed.

In *School Board of City of Charlottesville, Va.* v *Allen*, 240 F. 2d 59 (C.C.A. 4th), the trial court found:

> "They have given no evidence of any willingness to comply with the ruling of the Supreme Court at any time" (p.61).

This is taken from the opinion of the appellate court:

> "It had been two years since the first decision of the Supreme Court in *Brown* v. *Board of Education* and, despite repeated demands upon them, the boards of education *had taken no steps towards removing the requirement of segregation in the schools which the Supreme Court had held violative of the constitutional rights of the plaintiffs.* This was not 'deliberate speed' in complying with the law as laid down by the Supreme Court but was clear manisfestation of an attitude of intransigence, which justified the issuance of the injunctions to dispel the misapprehension of school authorities as to their obligations under the law and to bring about their prompt compliance with constitutional requirements as interpreted by the Supreme Court" (p.64) (emphasis supplied).

In *Orleans Parish School Board* v. *Bush* 242 F. 2d 156 (C.C.A. 5th), the situation was the same. The School District had made no start and it was ordered to do so. From the opinion:

> "It is evident from the tone and content of the trial court's order and the willing acquiescence in the delay by the aggrieved pupils that a good faith acceptance by the school board of

> the underlying principle of equality of education for all children with no classification by race might well warrant the allowance by the trial court of time for such reasonable steps in the process of desegregation as appears to be helpful in avoiding unseemly confusion and turmoil. Nevertheless whether there is such acceptance by the Board or not, the duty of the court is plain. The vindication of rights guaranteed by the Constitution can not be conditioned upon the absence of practical difficulties" (p.166).

That language was used in 1957, two years after the second *Brown* decision, with respect to a district that had not even formulated a plan of integration. The last sentence in the quotation is the thesis of respondents. As an abstract declaration of law, it cannot be challenged. As a working rule to be applied in all situations in the absence of power on the part of the Federal Government to vindicate federal rights and in the presence of forces which, if injected, will destroy public education for both white and Negro pupils, it can only be classed as obiter.

As stated in *Brown*—

> "Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner."

If the public interest is important and if it is demonstrated that a too rapid enforcement of private rights is harmful to the public interest, the ultimate decision must come out of a balancing of the equities between the two. In such situations there is little helpfulness in a legal abstraction.

In *Allen* v. *County School Board of Prince Edward County, Va.*, 249 F. 2d 462, (C.C.A. 4th), the school district was still stalling as late as November, 1957. The District Judge had declined to order it to proceed and gave the following reasons:

(a) Opposition to the order;

(b) racial tension in the community; and

(c) the possible closing of schools under a Virginia statute.

Apparently no testimony was offered. Like the school officials in *Jackson*, the District Judge did not think the community was ready. Evidently the only racial tension in existence was of the pro and con type which develops in all southern localities when integration is discussed.

In short, the Virginia situation was identical to that of Jackson. There had been no start and the only reason for the delay was that the populace did not like the idea. The Court said:

> "* * * Furthermore, it would not be necessary for the requirement as to segregation to be removed at once with respect to all grades in the schools, if a reasonable start were made to that end with 'deliberate speed' considering the problems of proper administration. See order in the Arlington case, approved by this court, 240 F. 2d at page 61, also *Aaron* v. *Cooper*, (8 Cir.) 243 F. 2d 361.
>
> "The fact that the schools might be closed if the order were enforced is no reason for not enforcing it. A person may not be denied enforcement of rights to which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights" (p.465).

In the foregoing cases only a "mental attitude" was involved. There were no overt acts of interference which crippled operations. The law draws a distinction in many fields between a mental attitude and an act. The first may be licit while the second may be illicit. Here the District is not confronted with what people of the community think about integration. It is confronted with such realities as: Destroying school property; planting disobedience in the minds of the pupils; making the lives of the school officials and teachers miserable; plunging the District into expenses it cannot afford; spreading panic by bomb threats; depriving pupils, Negro and white, of an opportunity to obtain a normal education, etc., etc.

In the cases discussed above, the courts could never have envisioned the turmoil, chaos and confusion which agitators have thrust into the schools operated by the District, and no court intends its opinion to be stretched in meaning so as to furnish a guide for factual situations unknown and unknowable at the time it was rendered.

If there were nothing in this record other than proof of a mental attitude, the position of the District would be untenable under the decisions above mentioned. If, on the other hand, there are illegal and overt acts of interference which cannot be halted by the District or some law enforcing agency, then the schedule first adopted should be modified.

Respondents say a constitutional right cannot be denied even to "promote the public peace by preventing race conflicts." From that it does not necessarily follow that a constitutional right, the enjoyment of which is conditioned by the decision creating it, cannot reasonably be postponed in order to protect the

public interest. It is stated in *Brown* that in the elimination of obstacles in the transition from segregated to integrated schools the courts shall "take into account the public interest." The public interest referred to is that mass of rights belonging to whites and Negroes which are rooted in public education.

Of course, no constitutional right should be impaired on the basis of what some partisan says may happen in the future. That, however, is not the situation before this Court. Here we are dealing with a constitutional right and the existence of conditions which enter into a decision as to whether it is enforceable in the manner and according to the original time schedule.

III

RESPONSIBILITY FOR ENFORCEMENT

The argument that the District should be denied relief because it did not affirmatively enforce the public peace and quell insurrection is probably as unrealistic as that involving the drayman and the bridge.

This is no mere instance of a handful of disgruntled extremists in the community. The matter is rather one of massive resistance to and defiance of a constitutional principle running counter to the mores of the people. Under the leadership of popular office holders the people of the state are launched on a steady course of absolute nonrecognition of the validity of the *Brown* decisions, usually on the premise that they are unconstitutional. The people have been told repeatedly by high officials, nationally syndicated columnists and others that the *Brown* decisions are not "the law of the land".

The District's attempted desegregation met with total opposition by the state government. As Mr. Blossom stated (R.273):

> "My opinion as to that, sir, would be that we have had total opposition from the State in that the executive branch of state government placed the troops around the school; the legislative branch of the government passed the segregation acts, the judicial branch of the government has not aided in any enforcement. Now that may be a lay interpretation, but in our system of government that embraces all three branches of it, and instead of aid we have opposition."

And the Court may take judicial notice that two weeks ago the Arkansas legislature voted almost unanimously for the drastic anti-integration legislation proposed by the governor and the attorney general.

At no time have the people of Little Rock or the school board expressed a feeling that integration of schools is desirable. The converse is true. But initially most people felt a responsibility as citizens to comply with orders of federal courts if that day came. When the District announced its plan of limited integration over a period of time most appeared satisfied that this was the best solution to a difficult problem.

Because of the statements made by our state's leadership, because of the failure of the Department of Justice to prosecute members of mobs and others hampering the federal courts, because several school districts retracted desegregation plans with impunity, because school districts refusing to formulate desegregation plans are still unintegrated despite months

and years of litigation, the people of Little Rock have changed their opinion. Now, in view of the above, the people believe that the District's plan was wholly unnecessary in light of the other means of resistence, legal and otherwise.

The District has exercised good faith with the courts and will continue to do so but its task is not one of preserving the peace. It did not pursue a plan of desegregation through choice, and it should not now be placed in the position of being duty bound to quell defiance. It is not the function of a school district to act as a buffer in a contest between state and federal authority, and certainly not to act as the bulwark of federal authority in such a contest.

This Court, in giving a new interpretation to the Fourteenth Amendment, has pronounced a rule of law which is well in advance of the mores of the people of this region and violent opposition to its principle has erupted.

The purpose behind the filing of the Petition is to ascertain whether a non-combatant school district must submit to interference such as is revealed here in the absence of any effective protection from the Federal Government. If no protection is to be expected in two and one-half years, it will be wise to suspend operations for that period. If, in the nature of things, there will never be any protection, operations should be suspended until such time as the people, by the processes of time, are taught to respect Federal Court decisions and to be willing, on patriotic grounds, to subdue the passions which now control their thinking.

Instead of facing the problem, the Respondents would gulp the rights which are said to be theirs

The decision undoubtedly marks the opening of a "new era" in race relations in the South. The period of quiet watching and waiting is over. School officials need no longer operate in "a twilight zone" of uncertainty, now that the Court has spoken. Any new era must take cognizance of the Negro population as a "caste" apart and the provisions now existent for separate educational systems. These two factors have created problems of administration of the public schools which are unique in the land, if not the world.

A last obstacle worth considering is the readiness of some to accept or to tolerate evasion of the Court's decision. This fact raises a most serious question. It appears that the well-housed and the respected will continue to spearhead the movement of malevolence. It is they who speak in voices strident and raucous. What they say, consequently, has a special unpalatability because they are among the "respected" members of society. In some quarters, the appealers to "mob spirit" have the support of important blocs. Under the guise of the "Men of This" or the "Women of That", the superpatriots will arrogate to themselves the responsibility for "preserving the Constitution" and "our sacred American way of life". That it is difficult to explain their failure to reject spurious reasoning, to repudiate policies clearly designed to hurt their fellow man, does not trouble the advocates of law evasion. Most frightening of the prospects is that inadvertently new life may be injected into the discredited Ku Klux Klan. Costly and lengthly litigation may be supplanted by the weapons of intimidation and violence. As one writer had observed, it appears that the only thing which could "revive this floundering aggregation of bed-sheeted heroes would be a Supreme Court order abolishing segregation in the public schools."

AUTHOR W. E. GAUERKE

Open defiance, or "popular nullification", of the decision is generally conceded to be the least likely alternative to the decision chosen by the Southern states. There will be, however, counter measures of delay and more delay, of attempts to expand the "separate but equal" concept, of establishment of "free private" schools, of rezoning in city areas. *For only the zealots see in court decisions the opportunity to integrate the dual school system within the immediate future.* Even though the Southern states will have to abide by the Court's decision and acclimate themselves to the law, they will do it neither willingly, completely, nor at once (emphasis supplied).

To resolve the dilemma of legislative and constitutional mandates, federal and state, which are in conflict with each other and, seemingly, with democratic and religious assumptions about freedoms and autonomy, is the formidable job before at least seventeen of the state governments. The problem for each will be how to best live with inevitable change.

AUTHOR MOZELL HILL

It is unfortunate that in a few deep South states the political climate in the immediate future will not be conductive to sane thinking and calmness. In a few of these states, political figures have already gone a long way toward amending the legal and political structures of the states so that communities will find it virtually impossible to comply with the Court's decision. There is little doubt that these political figures will be "successful" in their efforts and by these tactics they will hamper and even delay the desegregation process in a number of Southern communities for many years.

To enforce the law of the land is obviously a duty of a law enforcing agency, but one of the vital questions here is whether any such duty rests on a school district. If it be said that the duty rests on the school district, then we ask how can it possibly enforce the federal law and where is it to obtain funds to be used for the purpose?

IV

THE DISTRICT IS ENTITLED TO RELIEF

The District has requested and received from the District Court a stay of desegregation for two and one-half years. Its request was granted for compelling reasons of public interest and preservation of the educational system. The Circuit Court of Appeals reversed although admitting the predicament of the District.

The District Court found that the situation was intolerable but this term cannot begin to describe the loss to the community and the nation that results from impairment and even breakdown in the educational process. This Court should not revisit chaos and bedlam upon the District, but rather should uphold District Judge Lemley in his determination of the local situation..

Where a school board has made a prompt start toward desegregation and has continued throughout to exercise good faith, severe impairment of the educational system both present and prospective because of desegregation entitles the school district to a postponement regardless of the source and motivation of the destructive forces. The second *Brown* decision was so construed by the District Court.

If the *Brown* rule is not sufficiently flexible to allow time for the subsidence of forces such as are arrayed here against it, then it may be seriously doubted whether courts are able to effectively cope with "state action" such as this, and perhaps this Court should so hold. Certainly the legislative and political departments of the United States government have displayed little willingness to assist in the implementation of the *Brown* decisions, although the matter would seem to rest more appropriately in those departments where obstruction by the governor and legislature and mass opposition by the people of a state is concerned.

We are not saying that all of the havoc created by the militant conflicting forces arrayed against each other as a result of the *Brown* decisions can be dispelled within the next two and one-half years, but we are saying that a reasonable period of calm is the only hope of producing solutions to the distressing problems which this School Board and the people of this community must solve. This School Board pleads for that opportunity. The ruling of the District Court can and should be upheld within the framework of the pronouncements of this Court in the *Brown* decisions.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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APPENDIX

FOLKWAYS by WILLIAM GRAHAM SUMNER

In our southern states, before the civil war, whites and blacks had formed habits of action and feeling toward each other. They lived in peace and concord, and each one grew up in the ways which were traditional and customary. The civil war abolished legal rights and left the two races to learn how to live together under other relations than before. The white have never been converted from the old mores. Those who still survive look back with regret and affection to the old social usages and customary sentiments and feelings. The two races have not yet made new mores. Vain attempts have been made to control the new order by legislation. The only result is the proof that legislation cannot make mores. We see also that mores do not form under social convulsion and discord. It is only just now that the new society seems to be taking shape. There is a trend in the mores now as they begin to form under the new state of things. It is not at all what the humanitarians hoped and expected. The two races are separating more than ever before. The strongest point in the new code seems to be that any white man is boycotted and despised if he "associates with negroes". Some are anxious to interfere and try to control. They take their stand on ethical views of what is going on. It is evidently impossible for any one to interfere. We are like spectators at a great natural convulsion. The results will be such as the facts and forces call for. We cannot foresee them. They do not depend on ethical views any more than the volcanic eruption on Martinique contained an ethical element. All the faiths, hopes, energies, and sacrifices of both

whites and black are components in the new construction of folkways by which the two races will learn how to live together. As we go along with the constructive process it is very plain that what once was, or what any one thinks ought to be, but slightly affects what, at the moment, is. The mores which once were are a memory. Those which any one thinks ought to be are a dream. The only thing with which we can deal are those which are.

The abolition of slavery in the northern states had been brought about by changes in conditions and interests. Emancipation in the South was produced by outside force against the mores of the whites there. The consequence has been forty years of economic, social, and political discord. In this case free institutions and mores in which free individual initiative is a leading element allow efforts towards social readjustment out of which a solution of the difficulties will come. New mores will be developed which will cover the situation with customs, habits, mutual concessions, and cooperation of interests, and these will produce a social philosophy consistent with the facts. The process is long, painful, and discouraging, but it contains its own guarantees.

We often meet with references to Abraham Lincoln and Alexander II as political heroes who set free millions of slaves or serfs "by a stroke of the pen". Such references are only flights of rhetoric. They entirely miss the apprehension of what it is to set men free, or to tear out of a society mores of long growth and wide reach. Circumstances may be such that a change which is imperative can be accomplished in no other way, but then the period of disorder and confusion is unavoidable. The stoke of the pen never does anything but order that this period shall begin.

All these cases go to show that changes which run with the mores are easily brought about, but that changes which are opposed to the mores require long and patient effort, if they are possible at all.

If we admit that it is possible and right for some to undertake to mold the mores of others, of set purpose, we see that the limits within which any such effort can succeed are very narrow, and the methods by which it can operate are strictly defined. The favorite methods of our time are legislation and preaching. These methods fail because they do not affect ritual, and because they always aim at great results in a short time. Above all, we can judge of the amount of serious attention which is due to plans for "reorganizing society", to get rid of alleged errors and inconveniences in it. We might as well plan to reorganize our globe by redistributing the elements in it.

Strictly speaking, there is no administration of the mores, or it is left to voluntary organs acting by moral suasion. The state administration fails if it tries to deal with the mores, because it goes out of its province.

Great crises come when great new forces are at work changing fundamental conditions, while powerful institutions and traditions still hold old systems intact. The fifteenth century was such a period. It is in such crises that great men find their opportunity. The man and the age react on each other. The measures of policy which are adopted and upon which energy is expended become components in the evolution. The evolution, although it has the character of a nature process, always must issue by and through men whose passions, follies, and wills are a part of

it but are also always dominated by it. The interaction defies our analysis, but it does not discourage our reason and conscience from their play on the situation, if we are content to know that their function must be humble.

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AUTHOR RUPERT VANCE

What of those important officers of administration, the members of local school boards? What alternative have they? Obviously their alternatives are limited: they cannot resign when they are sued, enjoined, or jailed for the community's noncompliance with the law. But as citizens they can refuse service on school boards. Since there is political capital to be gained in these areas, such refusal to serve may well be selective—exercising negative selection on the more moderate business men and administrators, and bringing forward those types who realize the political rewards to be reaped through the revival of the "Negro baiting" tactics of the recent past.

AUTHOR WYLIE H. DAVIS

Georgia is the only state which has immediately reacted to the school decisions with loud rumblings of threatened violence. Governor Talmadge and his cohorts, including some of his potential assignees

office, have pledged employment of the state militia if necessary as a last resort to keep the Negroes out of the white schools. Those who respect the law even when they are appalled with it will hope that such threats turn out to be a bluff. If armed resistance to specific court decrees, by state troops or vigilantes, should materialize, it might very well thwart the judicial process acting alone. Its occurrence could lead to a shocking denouement, since such defiance of the federal judiciary could not be ignored by President Eisenhower and his administration.

Evasion or definance of the law on a large scale would be a distressing blow to the education of whites and Negroes alike in the South, accompanied probably by a retrogression in every other phase of race relations. The general calmness that has followed the school segregation cases, albeit with plenty of argumentative discussion among the rank and file and a little political football, is an encouraging sign. The churches too may wield a powerful influence in the eventual adjustment of the problem. There are already definite indications that many Southern churchmen and law leaders do not relish being momentarily outdistanced by a secular body on the education route to human brotherhood. They may experience an increasingly strong moral and spiritual compulsion to do some catching up (emphasis supplied).

One authority regards our separate schools as the "essential nub of race relations". Any satisfactory solution to the problems of interracial relations, it is contended, must be predicated on that assumption. The readjustment required, states sociologist Howard Odum, constitutes the most crucial domestic problem in the United States in 1954.

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IN THE

Supreme Court of the United States

AUGUST SPECIAL TERM 1958

[redacted] No. 1

WILLIAM G. COOPER, *et al.*, Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and VIRGIL T. BLOSSOM, Superintendent of Schools,

Petitioners,

—v.—

JOHN AARON, *et al.*,

Respondents.

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IN THE

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Petitioners,

—v.—

JOHN AARON, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS

Preliminary Statement

Briefs for petitioners and respondents being filed simultaneously we have not seen the "Statement of the Case" in petitioners' brief. We assume that such statement will be accurate and adequate. In any event, the Opinion of the Court of Appeals adequately sets forth the facts. We, however, call this Court's attention to one paragraph of the Opinion of the Court of Appeals which states as follows:

> It is not the province of this Court in this proceeding to advise the Board as to the means of implementing integration in the Little Rock Schools. We are directly concerned only with the legality of the order under

review. We do observe, however, that at no time did the Board seek injunctive relief against those who opposed by unlawful acts the lawful integration plan, which action apparently proved successful in the Clinton, Tennessee and Hoxie, Arkansas situations. See *Kasper* v. *Brittain*, 245 F. 2d 92 (6 Cir. 1957), *certiorari denied* 355 U. S. 834, rehearing denied 355 U. S. 886; *Hoxie School District* v. *Brewer* (E. D. Ark.), 137 F. Supp. 364, aff'd *Brewer* v. *Hoxie School District* (8 Cir. 1956), 238 F. 2d 91. The evidence also affords some basis for belief that if more rigid and strict disciplinary methods had been adopted and pursued in dealing with those comparatively few students who were ring leaders in the trouble making, much of the turmoil and strife within Central High School would have been eliminated.

Questions Presented

The questions presented by the Petition for Certiorari are:

(1) Whether a court of equity may postpone the enforcement of the respondents' constitutional rights if the continued enforcement thereof will result in an intolerable situation and great disruption of the educational process to the detriment of the public interest, the schools, and the students including the respondents.

(2) Whether a school district has a duty and obligation, by invoking extraordinary legal processes and otherwise, to quell violence, disorder and organized resistance to desegregation.

Summary of Argument

I

Neither overt public resistance, nor the possibility of it, constitutes sufficient cause to nullify the orders of the federal court directing petitioners to proceed with their desegregation plan. This Court and other courts have consistently held that the preservation of public peace may not be accomplished by interference with rights created by the Federal Constitution.

Applying this familiar rule, this Court held in the *School Segregation Cases*, that delay could not be predicated on opposition to desegregation.

The sustension of this principle is all the more imperative where, as here, the forces at work to frustrate the Constitution and the authority of the federal courts were deliberately set in motion by the Governor of a state whose school system is under mandate to achieve conformity with the Constitution. Here one state agency, the School Board, seeks to be relieved of its constitutional obligation by pleading the *force majeure* brought to bear by another facet of state power. To solve this problem by further delaying the constitutional rights of respondents is unthinkable.

II

Hardship to petitioners is no excuse for abrogating the Rule of Law, but even if it were, petitioners here cannot validly claim it.

Petitioners had at their disposal and still have available to them a legal remedy to prevent interference with the performance of their constitutional duties

There is no ground for a presumption that the authorities charged with the duty of enforcing the law will refuse or be unable to perform this duty. In fact, the federal government stands ready to perform this duty.

Even if it be claimed that tension will result which will disturb the educational process, this is preferable to the complete breakdown of education which will result from teaching children that courts of law will bow to violence.

Argument

The decision of the Court of Appeals setting aside Judge Lemley's two and one-half years suspension of desegregation was correct and should be sustained. Indeed, the decision is so eminently sound, so clearly in harmony with decisions of this Court and other federal courts, that the questions presented by the Petition for Certiorari could hardly even be characterized as substantial, were it not for two factors:

First, the legal controversy over the obligation of the Little Rock School Board to proceed with the desegregation of Central High School, and other schools it manages, pursuant to the original, and judicially approved, schedule has now become a national test of the vitality of the principles enunciated in *Brown* v. *Board of Education.*

Second, the principal ground urged for overruling the Court of Appeals' decision is, in essence, that unless petitioners' obligation to proceed with desegregation of the Little Rock schools is suspended, ruffians with or without support from state officials will resume their attempts forcibly to block the execution of valid federal court orders. Acquiescence in any such argument would subvert our entire constitutional framework.

In short, this case involves not only vindication of the constitutional rights declared in *Brown,* but indeed the very survival of the Rule of Law. This case affords this Court the opportunity to restate in unmistakable terms both the urgency of proceeding with desegregation and the supremacy of all constitutional rights over bigots—big and small.

I

Overt public resistance including mob protests is not sufficient cause to nullify federal court orders requiring gradual desegregation of public schools.

The Petition for Certiorari herein filed seeks a reversal of the decision of the Court of Appeals for the Eighth Circuit complaining:

> The Circuit Court of Appeals for the Eighth Circuit agreed with the findings of the District Court that the evidence is appalling but that great additional expense, disruption of normal educational procedures, tension and nervous collapse of the school personnel, turmoil, bedlam, and chaos, are not a legal basis for suspension of the plan since this would be an accession to the demands of insurrectionists.

The Court of Appeals defined the issue in the case as: "whether overt public resistance, including mob protest, constitutes sufficient cause to nullify an order of the federal court directing the Board to proceed with its integration plan." There has never been a suggestion that the rule is other than as stated in *Buchanan* v. *Warley,* 245 U. S. 60, 81:

> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preserva-

tion of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

This principle has been reiterated in connection with housing in the City of Birmingham which faced threats of bombing because Negroes had purchased in a zone forbidden to their race, *City of Birmingham* v. *Monk,* 185 F. 2d 859 (5th Cir. 1950), cert. denied 341 U. S. 940; in reversing an order of the United States District Court for the Eastern District of Arkansas which dismissed a writ of habeas corpus submitted by petitioners who had been convicted of murder after a promise of "leading officials" to a lynch mob "that, if the mob would refrain . . . they would execute those found guilty in the form of law . . .," *Moore* v. *Dempsey,* 261 U. S. 86, 88-89; in holding a governor forbidden to close a factory beset by rioters during a strike, *Strutwear Knitting Co.* v. *Olson,* 13 F. Supp. 384 (D. Minn. 1936); in rejecting a claim of the government that an American citizen of Japanese ancestry should have been confined because "community hostility towards the evacuees . . . has not disappeared," *Ex parte Endo,* 323 U. S. 283, 297; and in holding, that notwithstanding a national military emergency the constitutional rights of steel producers could not be abridged by presidential seizure. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579.

The imperviousness of the Rule of Law to arguments of this sort is, after all, the underlying foundation of equal justice under law. For if criminal defendants, home owners, manufacturers, and others can be routed from their lawful rights by a transient emergency, then we have returned to a state prior to civil society, when there was the Hobbesian state of "a war of all men against all men."[1]

[1] Hobbes, De Cive I, 12 (1651).

This Court reaffirmed this premise of lawful government in *Brown* v. *Board of Education,* 349 U. S. 294, 300:

> . . . . it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

The federal judiciary (with the exception of Judge Lemley whom the Court of Appeals reversed herein) has uniformly followed this rule. See *Jackson* v. *Rawdon,* 235 F. 2d 93, 96 (5th Cir., 1956), cert. denied 352 U. S. 925; *School Board of Charlottesville, Va.* v. *Allen,* 240 F. 2d 59, 64 (4th Cir., 1956), cert. denied 353 U. S. 910; *Orleans Parish School Board* v. *Bush,* 242 F. 2d 156, 163-164 (5th Cir., 1957), cert. denied 354 U. S. 921; *Allen* v. *County School Board of Prince Edward County,* 249 F. 2d 462, 465 (4th Cir., 1957); *Mitchell* v. *Pollack,* 1 Race Rel. L. Rep. 1038 (D. C. Ky., 1956).[2]

Therefore, the court below acted in consonance with all lawful precedent and the best traditions of constitutional government when it said:

> The issue plainly comes down to the question of whether overt public resistance, including mob protest, constitutes sufficient cause to nullify an order of the federal court directing the Board to proceed with its integration plan. *We say the time has not yet come in these United States when an order of a Federal Court must be whittled away, watered down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto.*

[2] A like rule was long ago recognized at English common law. *Beatty* v. *Gillbanks,* L. R. 9 Q. B. Div. 314, 51 L. J. Mag. Cas. N. S., 117, 47 L. T. N. S. 194, 31 Week Rep. 275, 15 Cox, C. C. 138, 46 J. P. 789.

II

Any suspension of petitioners' original plan of gradual desegregation would subvert rather than preserve the fundamental objective of public education.

Throughout, petitioners' argument is that education at Central High School has been seriously impaired by lawless acts and the only solution is to revert to segregated education as terms for peace with the lawless elements. This plea is predicated on the argument that unless this is done the total educational system at Central High School will be seriously impaired or destroyed.

In the first *Brown* opinion this Court, however, made the following declaration as to the position of education in our modern day life, 347 U. S. 483, 493:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

Applying these principles to this case the Solicitor General effectively disposed of the School Board's contention in his argument before the Court on August 28:

> But when you talk about a deterioration of the educational process in this school, it seems to me that one

of the things that all educators, certainly teachers, would recognize, is that part of the educational process is the attitude and conduct of the teachers, the personnel of the school and the children themselves, and part of their responsibility is to get across to these teachers and for the teachers to get across to the children and those that are in the educational process, the responsibility to enforce the laws; that we do live in a country where we seek to maintain law and order for the benefit of all the people, that the Constitution and each of the rights that every citizen has under it, is precious to every one of us, not just the rights that I like and want for me, or that you like and want for you, but all of them for every man and woman.

And that if you teach these children in Little Rock or any other place in the country that as soon as you get some force and violence, the courts of law in this country are going to bow to it, they have no power to deal with it, they will give way to it, will change everything to accommodate that, I think that you destroy the whole educational process then and there. Transcript of Argument, Aug. 28, 1958, p. 107.

This Court recognized as much in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, in which Justice Jackson wrote, at p. 637:

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free

mind at its source and teach youth to discount important principles of our government as mere platitudes.

Indeed, the Supreme Court of Arkansas has embraced the same principle in a case in which it upheld the right of a school board to expel a student who had disobeyed school regulations. While the board was upheld in its enforcement of the particular regulation (concerning the wearing of cosmetics) as reasonable, the language of the court may properly be quoted here: "It will be remembered also that respect for constituted authority, and obedience thereto, is an essential lesson to qualify one for the duties of citizenship, and that the schoolroom is an appropriate place to teach that lesson." *Pugsley* v. *Sellmeyer*, 158 Ark. 247, 253, 250 S. W. 538, 539 (1923).[3]

Petitioners have a duty to accord respondents the equal protection of law and should have sought injunctions against the unlawful interferences with their performance thereof.

Petitioners, in the second of the questions presented in their application for a writ of certiorari, ask whether they have "a duty and obligation, by invoking extraordinary legal processes and otherwise, to quell violence, disorder and organized resistance to desegregation."

Assuming the question is properly before the Court, it cannot be gainsaid that petitioners could have invoked

[3] See Cremin, Lawrence A. and Borrowman, Merle L., Public Schools In Our Democracy 88-102, 204-216 (1956); Grieder, Calvin and Rosenstengel, William E., Public School Administration 89-98 (1954); Griffiths, Daniel E., Human Relations in School Administration 14-20, 152-161, 240, 207-309 (1956); Koopman, G. Robert; Miel, Alice; and Misner, Paul J., Democracy in School Administration 225-276 (1943); Newlon, Jessie H., Education for Democracy in Our Time 168-169 (1939); Richards, Edward A., Ed., Midcentury White House Conference on Children and Youth, Washington, D. C. 1950, *passim* (1951).

"extraordinary legal processes" to restrain interference with the performance of their duty to accord respondents nonsegregated public education. See *Thomason* v. *Cooper*, 254 F. 2d 808 (8th Cir., 1958); *Faubus* v. *United States*, 254 F. 2d 797 (8th Cir., 1958), pending on petition for a writ of certiorari, No. 212, Oct. Term, 1958.

In addition, petitioners certainly had and have a duty to preserve discipline and order in and about the premises. And where, as here, third parties seek to upset discipline and order in attempts "to deprive (among others) Negro pupils of their constitutional rights, then it would seem proper for [the School Board], so closely related as they were to victims in this case, to bring a restraining suit. They were officials of a great state and an omission by them would, in effect, be a deprivation of rights under the color of law." *Hoxie School Dist. No. 46 of Lawrence Co., Ark.* v. *Brewer*, 137 F. Supp. 364, 367 (E. D. Ark. 1956), *affirmed Brewer* v. *Hoxie School Dist. No. 46*, 238 F. 2d 91, 100 (8th Cir., 1956); *Kasper* v. *Brittain*, 245 F. 2d 92, 94 (6th Cir., 1957).

CONCLUSION

To prevent further disorder, petitioners have urged this Court to approve Judge Lemley's order, the purpose of which is not to repress the lawless violence, but to give the sanction of law to the motives which inspired it. The answer can only be: not "while this Court sits."

Wherefore, respondents respectfully urge this Court to affirm the judgment of the Court of Appeals, reinstate the prior order of Judge Davies and order its mandate to issue forthwith.

Respectfully submitted,

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MOTION FILED SEP 8 1958

IN THE

Supreme Court of the United States

AUGUST, SPECIAL TERM, 1958

Misc. No. 1 [redacted]

JOHN AARON, et al., *Petitioners,*

v.

WILLIAM G. COOPER, et al., *Respondents.*

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WILLIAM G. COOPER, et al., *Petitioners,*

v.

JOHN AARON, et al., *Respondents.*

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND PETITION TO BE HEARD ON THE MERITS AND TO PARTICIPATE IN THE ORAL ARGUMENT UPON THE JURISDICTIONAL AND CONSTITUTIONAL QUESTIONS INVOLVED

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IN THE

Supreme Court of the United States

AUGUST, SPECIAL TERM, 1958

Misc. Nos. 1 and 2

JOHN AARON, et al., *Petitioners,*

v.

WILLIAM G. COOPER, et al., *Respondents.*

WILLIAM G. COOPER, et al., *Petitioners,*

v.

JOHN AARON, et al., *Respondents.*

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND PETITION TO BE HEARD ON THE MERITS AND TO PARTICIPATE IN THE ORAL ARGUMENT UPON THE JURISDICTIONAL AND CONSTITUTIONAL QUESTIONS INVOLVED

The Officers and Members of the Arlington County Chapter of the Defenders of State Sovereignty and Individual Liberties in lawful and peaceable assembly,

appearing in this proceeding by Counsel, hereby move for leave to file a brief as Amicus Curiae and petition the Court to be heard upon the merits and to participate in the oral argument upon the Jurisdictional and Constitutional Questions involved.

Respectfully submitted,

ARLINGTON COUNTY CHAPTER
DEFENDERS OF STATE SOVEREIGNTY
AND INDIVIDUAL LIBERTIES
ARLINGTON, VIRGINIA

By: JOHN BRADLEY MINNICK
Of Counsel

IN THE

Supreme Court of the United States

AUGUST, SPECIAL TERM, 1958

Misc. Nos. 1 and 2

JOHN AARON, et al., *Petitioners,*

v.

WILLIAM G. COOPER, et al., *Respondents.*

WILLIAM G. COOPER, et al., *Petitioners,*

v.

JOHN AARON, et al., *Respondents.*

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND PETITION TO BE HEARD ON THE MERITS AND TO PARTICIPATE IN THE ORAL ARGUMENT UPON THE JURISDICTIONAL AND CONSTITUTIONAL QUESTIONS INVOLVED

The specific grounds for the motion and petition are as follows:

1. As citizens of the United States and of Virginia, the State in which we reside, and being aggrieved by the intractable problems directly affecting the use and maintenance of the public free schools of Arlington County, Virginia, which have arisen out of this and

related proceedings before the Federal Judiciary, we are entitled to present our brief and to be heard on the merits as a matter of inalienable right of citizenship. Const., Art. VI, Cl. 2; Const., Amendments I, V, IX, X, XI and Amendment XIV, Sections 1 and 5; Virginia Declaration of Rights, Sections 1, 2, 3, 5, 7, 11, 12, 13, 14, 15, 16 and 17; R. S., section 1977 now 42 U. S. C., section 1981; *Pierce* v. *Society of Sisters* (1925) 268 U. S. 510, 534-535.

2. State law is the rule of decision in the Federal Courts unless the Constitution and the laws of the United States provide or require otherwise. Federal Rules of Decision Act, First Judicial Code, section 34, First Congress, First Session, Ch. 20, 1789, 1 Stat. 73, 92, now 28 U. S. C., section 1652; *Erie R. Co.* v. *Tompkins* (1938) 304 U. S. 64, 79-80.

3. For the purpose of this and related proceedings dealing with our public free schools, the Constitution and the laws of the United States do not provide or require otherwise. Const., Art. I, sections 1, 7 and 8; Const., Art. II; Const., Art. III; Const., Art. IV; Const., Art. VI, Cl. 2; Const. Amendments IX, X, XI and Amendment XIV, sections 1 and 5; Acts of Admission of the New States, commencing with the Act to Admit the States of North and South Dakota, Montana and Washington on an equal footing with the original States, section 14, Fiftieth Congress, Second Session, Ch. 180, February 22, 1889, 25 Stat. 676, 680, down to, through and including, the Act to Admit the State of Alaska on an equal footing with the other states in all respects whatsoever, section 6 (j), Public Law 85-508, 85th Congress, Second Session, July 7, 1958, 72 Stat. 339, 342; THIRD MORRILL ACT, Fifty-First Congress, First Session, Ch. 841, August

30, 1890, 26 Stat. 417, 418, now 7 U. S. C., section 323; see also index to United States Code under Negroes; and note (1) that these laws of the United States have not been questioned or challenged upon constitutional or any other ground, (2) nor were these laws of the United States raised, briefed, cited, argued, presented or otherwise put in issue in *Brown* v. *Board of Education of Topeka, Kansas,* and related cases (1954) 347 U. S. 483, and (3) that these laws of the United States constitute the supreme law of the land by constitutional definition, Const., Art. VI, Cl. 2; *Gibbons* v. *Ogden* (1824) 9 Wheat. 1; *McCulloch* v. *Maryland* (1819) 4 Wheat. 316.

4. The first opinion of this Court in a twice mooted case, *Brown, supra,* is not legally sufficient authority to negative any federal, state, or local law because the defendant was entitled to dismissal as a matter of right. Constitution, *supra;* Rules of Decision Act, *supra;* Third Morrill Act, *supra;* Act to Admit the State of Oklahoma (1906) 34 Stat. 271; *United States* v. *W. T. Grant Co.* (1953) 345 U. S. 629, 632; *Erie R. Co.* v. *Tompkins, supra;* stipulation of equality filed by counsel for the plaintiffs in *Brown* and related cases, *supra;* and the action of the Board of Education of Topeka, Kansas, when it adopted its own plan in 1953 to eliminate separate schools in Topeka, there being no state law or constitutional provision in Kansas which provided or required otherwise.

5. Our interests and the interests of all other interested citizens directly affected may not be adequately represented by existing parties. First Judicial Code, *supra,* section 35, 1 Stat. 92, 93; Act to Establish the Department of Justice, June 22, 1870, Forty-First Congress, Second Session, Ch. 150, sections 4 and 18,

16 Stat. 162, 165, now 5 U. S. C., sections 308 and 305, respectively; Rule 42 (3), Revised Rules of the Supreme Court, 28 U. S. C., Supp. V, 1952 Edition, following section 2071.

JURISDICTIONAL AND CONSTITUTIONAL QUESTIONS INVOLVED

I. The Question of Jurisdiction

A. Do the Federal Courts have jurisdiction where it appears that civil actions have been commenced or prosecuted against States by foreign, tax exempt, secret membership, monied corporations organized under the laws of the State of New York? Const., Art. III, Section 2; Const., Amend. XI; 28 U. S. C., section 1251 and Reviser's note.

B. Does the Supreme Court have jurisdiction over civil actions in which a national policy is sought to be established against States which were not parties to the original proceeding and in which the people directly affected have been given no opportunity to be heard? *Id.;* Const., Amendments V, IX, X and XIV.

C. Is a class action sufficient to establish a national policy against States which were not parties to the original proceeding and in which the people directly affected are given no opportunity to be heard? *Id.*

D. Can a national policy be established by the Federal Judiciary without consideration of the national policy established by the people acting through their duly elected and authorized representatives in the Congress of the United States assembled, or in a convention called for that purpose? *Id.*; Const., Art. I, Section 7; Const., Art. V.

E. Is the defendant entitled to dismissal as a matter of right in a moot case? *United States* v. *W. T. Grant Co., supra.*

II. The Constitutional Questions

A. When an opinion of the Supreme Court collides directly and indirectly with unquestioned and unchallenged Acts of Congress, which is the law within the meaning of the supremacy clause of our Constitution? Const., Art. VI, Cl. 2.

B. If it be held that the opinion of the Court is the law, then what effect does the judicial invalidation of the Acts of Admission of the New States have upon our Union? Const., Art. IV, Section 3; Acts of Admission, *supra.*

C. If it be held that the opinion of the Court is the law, then what effect does the judicial invalidation of the Morrill Acts have upon our land grant colleges? Const., Art. I, Section 8, Cl. 1; Morrill Acts, *supra.*

D. If it be held that the opinion of the Court is the law, then what effect does the judicial invalidation of the separation of powers of government have upon our Constitution? Const., Arts. I, II and III.

REASONS WHY JURISDICTIONAL AND CONSTITUTIONAL QUESTIONS WILL NOT BE PRESENTED ADEQUATELY BY THE PARTIES

1. The particular State directly affected and the several States equally affected have not been made parties to this proceeding. Const., Art., III, Section 2; Const., Amendment XI; 28 U. S. C., section 1251 and Reviser's note.

2. The United States has not been made a party to this proceeding in accordance with the law and the Rules of Court in that regard. 28 U. S. C., section 2403; Rule 24 (c), Federal Rules of Civil Procedure; *Speiser* v. *Randall* (June 30, 1958) —— U.S. ——, 26 LW 4479, 4481; and Exhibit A.

3. The Attorney General of the United States was notified of the constitutional questions involved; but he did not answer. *Davis* v. *County School Board of Prince Edward County, Va.*, Civil Action No. 1333, USDC Ed. Va. RD, decided August 4, 1958, *sub. nom. Eva Allen, et al.* v. *County School Board of Prince Edward County, Va.*, —— F. Supp. ——.

4. The United States Court of Appeals for the Eighth Circuit denied a motion in this case to certify the constitutional questions to this Court. 28 U. S. C., section 1254 (3); and Exhibit B.

5. Existing parties have not heretofore raised the jurisdictional nor the constitutional questions.

RELEVANCY OF THE JURISDICTIONAL AND CONSTITUTIONAL QUESTIONS TO THE DISPOSITION OF THIS CASE

1. This proceeding from its inception, commencing with the plan to eliminate separate schools in Little Rock, has no basis or foundation outside of the opinions of this Court in *Brown* v. *Board of Education of Topeka, Kansas,* and related cases, *supra.*

2. Jurisdiction was assumed in those cases on the sole ground that there was a constitutional issue.

3. The jurisdictional and constitutional questions were not raised nor decided in those cases.

4. Accordingly, the basic jurisdictional and constitutional questions have not been settled nor decided.

5. Wherefore, it is concluded that the jurisdictional and constitutional questions are material and relevant to the disposition of this case.

Respectfully submitted,

ARLINGTON COUNTY CHAPTER
DEFENDERS OF STATE SOVEREIGNTY
AND INDIVIDUAL LIBERTIES
ARLINGTON, VIRGINIA

By: JOHN BRADLEY MINNICK
Of Counsel

IN THE

Supreme Court of the United States

AUGUST, SPECIAL TERM, 1958

Misc. Nos. 1 and 2

JOHN AARON, et al., *Petitioners,*

v.

WILLIAM G. COOPER, et al., *Respondents.*

WILLIAM G. COOPER, et al., *Petitioners,*

v.

JOHN AARON, et al., *Respondents.*

BRIEF AS AMICUS CURIAE

STATEMENT OF THE CASE

I. The Plan

A. The voluntary plan to eliminate separate schools in Little Rock was approved by the Federal Judiciary upon authority of the opinion of this Court in *Brown* v. *Board of Education of Topeka, Kansas* (1954) 347 U. S. 483; (1955) 349 U. S. 294.

B. The plan did not work.

II. The Stay

A. The plan was first stayed by the state court upon application of interested citizens in a lawful and peaceable manner and after a full and complete hearing upon the merits.

B. The action of the state court was summarily set aside by the District Court below without a hearing.

C. On September 9, 1957, the very day on which the District Court ordered the Department of Justice to intervene in a civil rights case, the Congress of the United States repealed R. S. section 1989, 42 U. S. C., section 1993, thereby completely eliminating the statutory authority of the President to employ land or naval forces to aid in the execution of judicial process issued under 42 U. S. C., sections 1981-1983 or 1985-1992, or to prevent the violation and enforce the due execution of said sections. Civil Rights Act of 1957, Public Law 85-315, Part III, section 122, September 9, 1957, 71 Stat. 637, 42 U. S. C., section 1993 repealed. Parenthetically, it should be noted at this point that the original Part III of the Civil Rights Bill as proposed by the Department of Justice would have authorized intervention by the Attorney General in public education cases; but that it was specifically deleted in its entirety by the United States Senate before the Civil Rights Act of 1957 was passed by Congress and signed by the President.

D. On or about September 24, 1957, federal troops were used to enforce court orders, 18 U. S. C., section 1385 to the contrary, notwithstanding, there being no express authority by the Constitution or Act of Congress, nor any right named in the Constitution and secured by law.

E. The plan was again stayed. This time by the District Court below after a full and complete hearing upon the merits.

F. The stay granted by the District Court below was reversed by the United States Court of Appeals for the Eighth Circuit upon authority of the opinion of this Court in *Brown, supra;* but the reversal was stayed pending perfection of an appeal to this Court.

G. On August 28, 1958, leave was granted to file the School Board's petition for certiorari not later than September 8, 1958; briefs of the parties may be filed not later than September 10, 1958; and the matter is set for hearing upon the merits on September 11, 1958.

STATEMENT OF THE ARGUMENT

I. THE PROBLEM

The problem is racial, but the issues are constitutional. The problem has created a seemingly irreconcilable conflict between the Federal Judiciary and State Law concerning the basic, fundamental principles governing separate schools in public education. In 1952, this Court expressed the view that only those who are lacking in responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color and religion. *Beauharnais* v. *Illinois,* 343 U. S. 250, 262.

The question then arises whether, in the exercise of our liberty as parents to direct the upbringing and education of our children, we have contravened the equal protection of the laws by the establishment and maintenance of separate schools for white and colored children.

Accordingly, the question raises constitutional issues upon inspection.

II. THE ISSUE

The issue is not integration, nor is it segregation. That is the problem. The issue is whether the first opinion of this Court in the *Brown* case is legally sufficient to negative the supreme law of the land. In other words, if an opinion of this Court seeks to establish a national policy diametrically opposed to the national policy established by the people acting through their duly elected and authorized representatives in the Congress of the United States assembled, which is the law within the meaning of the supremacy clause of our Constitution? What legal effect does such an opinion have upon the law? What effect does it have on our Constitution, our Bill of Rights, and our State law? These are some of the questions which the people are asking because they are confused and do not know what the law is. The people are entitled to know and to be informed so that we may govern ourselves accordingly.

III. THE LAW

A. The Judicial Precedent

1. According to the Federal Judiciary, the "law" was settled in the *Brown* case which purports to negative all provisions of federal, state and local law which come in conflict therewith. *Brown, supra* (May 31, 1955) 349 U. S. 294. The settled part of the federal "law" about which the Courts and others speak, has no basis or foundation outside of the claims of social scientists affirmed by this Court in a moot case. *Brown, supra* (May 17, 1954) 347 U. S. 483. In 1952,

this Court expressed the view that it was not competent to affirm or deny the claims of social scientists as to the dependence of the individual on the position of his race or religion in the community. *Beauharnais* v. *Illinois, supra.* Nor does the Constitution require that things which are different in fact and opinion be treated in law as if they were the same. *Tigner* v. *Texas* (1940) 310 U. S. 141, 147.

2. The generally accepted definition of a "moot case" in both our state and federal courts is as follows:

> "A moot case is one which seeks to determine an abstract question which does not arise upon existing facts or rights." *Adams* v. *Union R. Co.* (1899) 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273, 276; see also, 27 Words and Phrases, Moot Case, pp. 536-539 and 1958 cumulative supplement; Black's Law Dictionary, Third Edition, p. 1203.

3. The five original so-called "school segration cases" were first mooted upon the facts by the stipulation of equality filed by counsel for the plaintiffs in order to raise an abstract psychological question which did not arise upon existing facts. Counsel was not satisfied with winning on the merits in Delaware in the state court because he had lost on the merits in Virginia, South Carolina, Kansas and the District of Columbia in the federal courts. The stipulation of equality was filed deliberately to bring the "psychological issue" before this Court because of the years of work and preparation which had gone into the same. *Cf.*, Thurgood Marshall Addressess Story Inn on Desegregation Issues, THE BRIEF, Phi Delta Phi Quarterly, Vol. 51, No. 3, Spring Issue, 1956, pp. 243-245. The *Brown* case, upon which the decision rested and because of

which the stipulation was filed, was mooted by action of the Board of Education when it changed its policy in 1953 and adopted its own plan to eliminate separate schools in Topeka, there being no state law of constitutional provision which provided or required otherwise.

4. An opinion in a moot case is not legally sufficient to settle any law because the defendant is entitled to a dismissal as a matter of right. *United States* v. *W. T. Grant Co.* (1953) 345 U. S. 629, 632.

B. The Constitutional Law

1. The Constitution and the laws of the United States made in pursuance thereof are the supreme law of the land by constitutional definition. Const., Art. VI, Cl. 2; *Gibbons* v. *Ogden* (1824) 9 Wheat 1; *McCulloch* v. *Maryland* (1819) 4 Wheat 316.

2. The Constitution gives Congress the power to provide for the general welfare and to admit new states; but it is completely silent upon the question of pubilc education. Const., Art. I, Section 8, Cl. 1; Const., Art. IV, Section 3.

3. The power to enforce the provisions of section 1 of the Fourteenth Amendment were retained specifically by Congress. Const., Amendment XIV, Section 5.

4. Congress acted in pursuance of the Constitution and under Section 5 of the Fourteenth Amendment after a quarter of a century of debate upon the question of separate schools in public education. THIRD MORRILL ACT (1890) 26 Stat. 418, now 7 U. S. C., section 323, as indexed in the United States Code under Negroes. Congress acted again when it provided for the establishment and maintenance of sepa-

rate schools for white and colored children in the Act to Admit the State of Oklahoma (1906) 34 Stat. 271.

5. These and the related Acts of Congress were not questioned or challenged upon constitutional or any other ground in *Brown, supra,* nor were these laws of the United States presented, cited, briefed, argued or otherwise put in issue so that the people could be informed and governed accordingly.

6. The Acts of Admission of the New States since 1889 provide that the States shall have exclusive control over their public schools forever, including the right to establish and maintain separate schools in public education. These provisions were developed out of the Morrill Acts under which our land grant colleges were established and maintained by the States. Land grants in aid of education commenced in 1826. First Land Grant Act in Support of Schools, May 20, 1826, 4 Stat. 179; see also, Act of Feb. 15, 1843, 5 Stat. 600, whereby Illinois, Arkansas, Louisiana and Tennessee were authorized to sell school lands and to invest the funds provided that the proceeds from the investments shall forever be applied to the use and support of the public schools.

7. The public school provisions in the Acts of Admission are "must" provisions without which the Acts would not have been passed. This is still true today. For example, in the proposed report to accompany S. 50 providing for the admission of the State of Hawaii into the Union as a full and equal sovereign State, it is stated under "LAND GRANTS" that "Educational institutions supported in whole or in part by such land grants *must* remain under exclusive control of the State * * *" (Italics suplied).

8. The separate school provisions of the Third Morill Act, *supra,* and of the Act to Admit the State of Oklahoma, were likewise "must" provisions without which those Acts would not have become law. For example see debates of Fifty-First Congress on the Third Morrill Act, S. 3714, 109 Congressional Record, pp. 6332-6351, 6369-6371, and especially at p. 6371 when Mr. Hoar said, "That is, in all cases where there are separate establishments for white and colored students, the principle which has just been adopted shall be applied." Accordingly, to negative these substantive provisions of the positive and definitive laws of the United States would be to negative the whole and thereby destroy the Union, the land grant colleges and public education.

9. Thus, there shall be no distinction on account of race or color in public education under the Constitution and laws of the United States, provided that separate schools heretofore or hereafter established shall be held by the Federal Judiciary and the Federal Executive to be a compliance if the funds are divided equitably. Third Morrill Act, *supra;* Act to Admit the State of Oklahoma, *supra.*

10. State law is the rule of decision because there is no conflict between the laws of the United States and the laws of the several States; and the Constitution does not provide or require otherwise. Rules of Decision Act, 28 U. S. C., section 1652; *Erie R. Co.* v. *Tompkins* (1938) 304 U. S. 64.

IV. CONCLUSION

Upon the case and the law, it is concluded that Judge Lemley's order should not be disturbed.

Respectfully submitted,

ARLINGTON COUNTY CHAPTER
DEFENDERS OF STATE SOVEREIGNTY
AND INDIVIDUAL LIBERTIES
ARLINGTON, VIRGINIA

By: JOHN BRADLEY MINNICK
Of Counsel

EXHIBIT A

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C.

August 29, 1958

Mr. John Bradley Minnick
5919 18th Street, North
Arlington 5, Virginia

Re: Aaron v. Cooper, No. 1 Misc., August, Special Term, 1958, S. Ct.

Dear Mr. Minnick:

Your letter of August 28, 1958 encloses a copy of your motion for leave to file a brief *amicus curiae* and the *amicus curiae* brief in this case. You also ask that the Solicitor General endorse his consent to the filing of the brief.

Since the Federal Government is not a party to this proceeding, it is not necessary or appropriate for the Solicitor General to consent to the filing of the brief. The consent of the Solicitor General is necessary and appropriate only in those cases in which the Federal Government is a formal party to the litigation.

Sincerely yours,

OSCAR H. DAVIS
Oscar H. Davis
First Assistant to the Solicitor General

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

St. Louis 1, Missouri,
July 24, 1958

Mr. John Bradley Minnick
5919 18th Street North
Arlington 5, Virginia.

Dear Sir:

Re: No. 16034. Aaron, et al. vs. Cooper, et al.

Enclosed herewith find copy of Order entered by this office today at the direction of the Court in the above case. This case will be heard at a special session of this Court to be held here at St. Louis on August 4, 1958.

If you desire to file a brief as amicus curiae it should be received in this office prior to August 4th and copies should of course be served on counsel for the respective parties. Enclose copy of brief of appellants.

Very truly yours,

ROBERT C. TUCKER
Robert C. Tucker,
Clerk.

G.
Encs.

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,034. September Term, 1957.

JOHN AARON, ET AL., *Appellants,*

VS.

WILLIAM G. COOPER, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

Motion to intervene for the purpose of having Constitutional questions certified to The Attorney General and the Supreme Court of the United States has previously been filed with the Clerk of this Court by John Bradley Minnick. The Motion has been considered by the Court, and it is now here Ordered that the motion is, in all respects, denied.

It is further Ordered that John Bradley Minnick is granted leave to file a brief as amicus curiae with this Court, and serve copies of said brief on the parties hereto. Ten clear, typewritten copies prepared on letter size paper and fastened on the left margin may be filed, or the brief may be printed in compliance with the Rules of this Court.

July 24th, 1958

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1, MISC.—AUGUST SPECIAL TERM, 1958.

John Aaron, et al., Petitioners.

vs.

William G. Cooper, et al., Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and Virgil T. Blossom, Superintendent of Schools, Respondents.

APPLICATION FOR VACATION OF ORDER OF COURT OF APPEALS FOR EIGHTH CIRCUIT STAYING ISSUANCE OF ITS MANDATE, FOR STAY OF ORDER OF DISTRICT COURT OF EASTERN DISTRICT OF ARKANSAS AND FOR SUCH OTHER ORDERS AS PETITIONERS MAY BE ENTITLED TO.

THURGOOD MARSHALL
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Attorneys for Petitioners

JACK GREENBERG
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WILLIAM TAYLOR

Of Counsel

SUPREME COURT OF THE UNITED STATES

No. 1, Misc.—August Special Term, 1958.

John Aaron, et al., Petitioners.

vs.

William G. Cooper, et al., Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and Virgil T. Blossom, Superintendent of Schools, Respondents.

APPLICATION FOR VACATION OF ORDER OF COURT OF APPEALS FOR EIGHTH CIRCUIT STAYING ISSUANCE OF ITS MANDATE, FOR STAY OF ORDER OF DISTRICT COURT OF EASTERN DISTRICT OF ARKANSAS AND FOR SUCH OTHER ORDERS AS PETITIONERS MAY BE ENTITLED TO.

To the Honorable Charles Evans Whittaker, *Associate Justice of the United States Supreme Court and Circuit Justice for the Eighth Circuit:*

Now come the petitioners, John Aaron, et al., and pray that the stay of mandate granted by the court below be vacated, that the order of the District Court be stayed, and for such other and further relief as may be appropriate and show the following:

1. On June 21, 1958, Judge Harry J. Lemley of the District Court of the United States for the Eastern District of Arkansas entered an order modifying the prior orders of that court which had been entered ordering respondents to proceed with their plan of gradual desegregation and ordered a suspension of the operation of that plan until mid-semester of the 1960–1961 school term. On the same day, petitioners filed a Notice of Appeal to the United States Court of Appeals for the

Eighth Circuit and applied to Judge Lemley for a stay of his order pending such appeal. The application for a stay was denied on June 23, 1958. On June 24, 1958, petitioners applied to the United States Court of Appeals for the Eighth Circuit for a stay of Judge Lemley's order pending appeal and on the same day petitioners' appeal was docketed in the United States Court of Appeals for the Eighth Circuit.

2. On June 26, 1958, petitioners herein filed in this Court petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit praying that this Court grant said writ of certiorari before judgment by the Court of Appeals and reverse the judgment below (see No. 1095 October Term, 1957).

3. On June 30, 1958, this Court entered a *per curiam* order, *Aaron* v. *Cooper*, — U. S. — 2 L ed. 2d 1544, stating that:

> . . . . The order that the District Court suspended has, in different postures, been before the Court of Appeals for the Eighth Circuit three times already. Aaron v. Cooper, 243 F 2d 361; Thomason v. Cooper, — F 2d — (April 28, 1958); Faubus v. United States, — F 2d — (April 28, 1958). That Court is the regular court for reviewing orders of the District Court here concerned, and the appeal and the petition for a stay are matters properly to be adjudicated by it in the first instance.
>
> We have no doubt that the Court of Appeals will recognize the vital importance of the time element in this litigation, and that it will act upon the application for a stay or the appeal in ample time to permit arrangements to be made for the next school year.
>
> Accordingly, the petition for certiorari is
> Denied.

4. On August 4, 1958, argument was had before the United States Court of Appeals for the Eighth Circuit in this cause and on August 18, 1958, said court handed down an opinion appended hereto as Exhibit "A", which

adequately describes the background of this cause, reversing the judgment of the District Court and holding in part that "the time has not yet come in these United States when an order of a Federal Court must be whittled away, watered down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto."

5. On August 20, 1958, petitioners filed a motion in the United States Court of Appeals for the Eighth Circuit requesting that the mandate in said case be issued forthwith. On the following day respondents filed a motion for stay of issuance of the mandate and on the same date, August 21, 1958, the United States Court of Appeals without allowing the petitioners the five days' opportunity to file a brief in opposition as provided by Rule 18 (b) of the Rules of the United States Court of Appeals for the Eighth Circuit said Court of Appeals granted respondents' application for stay of the mandate in said cause for a period of thirty days from said date and further providing that if within the period of thirty days it receives notice from the Clerk of the Supreme Court that an application for certiorari has been filed by petitioners, the stay is continued until said application is finally disposed of. Said stay is appended hereto as Appendix "B".

6. This Court may take judicial notice of the fact that the next school term at Little Rock Central High School commences on September 2. In denying the petition for writ of certiorari in order to permit the Court of Appeals to consider the issues involved, this Court stated that it had "no doubt that the Court of Appeals will recognize the vital importance of the time element in this litigation, and that it will act upon the application for a stay or the appeal in ample time to permit arrangements to be made for the next school year." But in the present posture of these proceedings, despite an opinion of the Court of Appeals deciding the right of petitioners to continue in nonsegregated schools, petitioners will be relegated back to segregated schools for at least a year. Thus, respond-

ents have effectively secured the relief they originally sought—a suspension of desegregation for an undetermined duration.

7. Petitioners' right to attend unsegregated schools has long since been settled, *Aaron* v. *Cooper*, 143 F. Supp. 855 (E. D. Ark. 1956), aff'd 243 F. 2d 361 (8th Cir. 1957) and petitioners have in fact attended an unsegregated school for one year. The only issue in this case is whether respondents are entitled under the circumstances presented here to an order suspending the rights of petitioners for any period of time. The court below has effectively decided this issue by issuing a stay. If that stay is allowed to stand until September 2, 1958, it will for all purposes constitute a final disposition of the only issue of this case.

8. Petitioners are Negro citizens of the United States residing in the State of Arkansas whose legal rights to attend Central High School in Little Rock are now beyond question. Yet if this procedural motion for a stay which the Court of Appeals has granted remains in effect at the beginning of the forthcoming school term and until this Court disposes of petition for writ of certiorari, that right will be withheld for perhaps the next school year or possibly even longer.

9. For authority that the decision on a motion for a stay in a litigation of this sort turns on considerations substantially co-extensive with those involved on the merits, see, *Lucy* v. *Adams*, 350 U. S. 1; *Tureaud* v. *Board of Supervisors*, 346 U. S. 886. That a stay pending further litigation is tantamount to a determination on the merits was the position of respondents before Judge Lemley when petitioners applied for a stay of his judgment. Judge Lemley ruled, in denying petitioners' application that to stay his judgment would be equivalent to negating his ruling on the merits. That equivalency still exists.

10. The traditional function of a stay is to maintain the status quo existing before the commencement of the

proceedings, until the party whose legal status has been altered is given an opportunity to appeal. But the effect of the stay issued by the court below was to alter the status quo by excluding petitioners from the schools they attended during the past year. Thus, the stay of mandate is in the same category as the denial by Judge Lemley of petitioners' motion to stay his order. Consequently, this Court has authority to stay the order issued by Judge Lemley and thereby maintain the status quo pending final decision by this Court. See, *Lucy* v. *Adams*, 350 U. S. 1.

11. If the stay order is permitted to stand and Judge Lemley's order remains in force petitioners' rights will be effectively destroyed, the damage will be irreparable and the order of a Federal Court will in fact "be whittled away."

WHEREFORE, petitioners pray that the stay order of the Court of Appeals for the Eighth Circuit be vacated and that the order of Judge Lemley be stayed and for such other relief as may be necessary to protect petitioners' declared constitutional rights.

The petitioners respectfully request an opportunity for oral argument of the above application at a time and place suitable to your convenience.

Respectfully submitted

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16034

John and Thelma Aaron, minors, by their mother and next friend, (Mrs.) Thelma Aaron; et al., Appellants,

vs.

William G. Cooper, et al., Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and Virgil T. Blossom, Superintendent of Schools, Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas.

[August 18, 1958.]

Wiley A. Branton and Thurgood Marshall (Elwood H. Chisolm, Irma Robbins Feder, Constance Baker Motley, and Spottswood W. Robinson, III, of Counsel) for Appellants.

Richard C. Butler and A. F. House, for Appellees.

Before Gardner, Chief Judge, and Sanborn, Woodrough, Johnsen, Vogel, Van Oosterhout and Matthes, Circuit Judges.

MATTHES, *Circuit Judge.*

This appeal is another in a series of legal actions which followed the adoption and implementation of a plan for

gradual integration of the public schools in Little Rock, Arkansas, as set up by the school board in that district, and approved by the United States District Court for the Eastern District of Arkansas, and by this Court. See, *Aaron* v. *Cooper* (E. D. Ark. 1956) 143 F. Supp. 855, aff'd 243 F. 2d 361 (8 Cir. 1957); *Thomason* v. *Cooper* (8 Cir. 1958) 254 F. 2d 808; *Faubus* v. *United States* (8 Cir. 1958) 254 F. 2d 797.

In conformity with the plan, and under the direction of the Superintendent of Schools of the Little Rock School District (hereinafter called "District"), approximately sixty Negro students were meticulously screened prior to the opening of schools in September, 1957. Seventeen were accepted for entrance in the final two years in high school, but when eight of the students voluntarily withdrew, the nine remaining attempted to enter the school when it opened. After a series of skirmishes, resulting in the placing of troops around the Central High School building, (see *Faubus* v. *United States, supra*), the nine Negro students were admitted and eight of them attended the full year. On February 20, 1958, the members of the school board (hereinafter called "Board") and the Superintendent, filed a petition in the United States District Court, Eastern District of Arkansas, Western Division, asking that the plan of integration "be realistically reconsidered in the light of existing conditions," and that it be postponed until such time as the concept of "all deliberate speed" could be clearly defined. Thereafter, the Honorable Harry J. Lemley, United States District Judge for the Eastern and Western Districts of Arkansas, was designated by the Chief Judge of this Circuit to hear and determine the issues presented by the petition. At the District Court's direction, appellees filed an amended petition in which they alleged that in light of existing conditions, they were of the opinion that a suspension of operations under the plan until January, 1961, was reasonable and advisable. Appellants attacked the petition by a motion to dismiss, contending that the petition was

insufficient to state a cause for relief or a claim for relief which would be cognizant under Rule 60 (b) of the Federal Rules of Civil Procedure. They also filed a response to the petition. Following an extended trial of the issues presented by the pleadings, the District Court filed an exhaustive opinion, — F. Supp. —, and entered its order granting permission to suspend the operation of the plan of integration until mid-semester of the 1960–61 school year.

From that order, plaintiffs (appellants) prosecuted an appeal to this Court. Because of the vital importance of the time element in the litigation, and in line with the suggestion of the Supreme Court in its per curiam order of June 30, 1958, on petition for certiorari, we heard the appeal on its merits on August 4, 1958.

A review of the events leading up to the present appeal, as revealed by the record, is necessary to a proper understanding of the meritorious question for decision.

On May 20, 1954, following the decision of the Supreme Court in *Brown* v. *Board of Education* on May 17, 1954, 347 U. S. 483, the Board adopted a statement concerning the *Brown* decision, recognizing its responsibility to comply with Federal Constitutional requirements, and on May 24, 1955—several days prior to the supplemental opinion of the Supreme Court in *Brown* v. *Board of Education,* 349 U. S. 294, the Board approved a "Plan of School Integration", which provided for a gradual integration of all public schools, beginning with the high school level, in the Fall of 1957. See *Aaron* v. *Cooper,* 143 F. Supp. 855 for the plan in its entirety, *aff'd* (8 Cir.) 243 F. 2d 361.

It was the feeling of the Board that the plan, as proposed was the most desirable and workable under all of the circumstances, and that as the result of an active public relations program, the public generally approved of the plan. However, a systematic campaign developed which undermined whatever confidence the public might have had in the plan to integrate the public schools. In

November, 1956, the people of the State of Arkansas adopted: (A) Amendment 44 to the State Constitution, which commanded the General Assembly to oppose by every constitutional method the "Un-Constitutional desegregation decisions of May 17, 1954 and May 31, 1955 (the two *Brown* decisions) of the United States Supreme Court" (1 Ark. Stat. 1947, 1957 Supplement); (B) A resolution of interposition which, inter alia, called upon the people of the United States and the governments of all the separate states to join the people of Arkansas in securing an adoption of an amendment to the Constitution of the United States which would provide that the powers of the federal government should not be construed to extend to the regulation of the public schools of any state, or to prohibit any state from providing for the maintenance of racially separate but substantially equal public schools within such state; (C) A pupil assignment law dealing with the assignment of individual pupils to individual public schools. The 61st General Assembly of Arkansas, which convened in January, 1957, enacted Sections 80–1519 to 80–1524, Ark. Stat. 1947, known as The Pupil Assignment Law; Section 80–1525, ibid, which relieves school children of compulsory attendance in racially mixed public schools; Sections 6–801 through 6–824, ibid, which established a State Sovereignty Commission; Section 80–539, ibid, which authorizes local school boards to expend district funds in employing counsel to assist in the solution of problems arising out of integration.

During the summer of 1957, anti-integration forces, pointing to the recent Arkansas enactments, petitioned for, and received from the Pulaski Chancery Court at Little Rock, an injunction directed against the Board, restraining any action towards integrating Little Rock Central High School during the school term beginning September 3, 1957. On August 29, 1957, on application of the Board, the United States District Court at Little Rock entered an order enjoining the use of the state court injunction in an attempt to block the integration plan.

We affirmed this order. *Thomason* v. *Cooper* (8 Cir.) 254 F. 2d 808.

From the testimony of the Superintendent, and voluminous exhibits, consisting mainly of newspaper articles and paid advertisements, it is demonstrated that pro-segregationists carried on a relentless and effective campaign during the summer of 1957. The Governor of Georgia, Marvin Griffin, and Roy V. Harris, publisher, of the same state, and Reverend J. A. Lovell, described as a "Texas Radio Minister," appeared in Little Rock and delivered speeches against integration to large audiences. The effect of these efforts may be gleaned from the Superintendent's testimony; (Mr. Blossom)—"[B]ut there was a tremendous amount of opposition following the appearance of the Governor of Georgia . . . that this plan which had been developed as I explained over a long period of time, seemed to be driven out of everybody's mind. . . . In the minds of people who talked to me the thing that became prevalent [was] 'We don't have to do this when the Governor of Georgia says nobody else has to do it.'" On July 9, 1957, what purports to be a full page paid statement appeared in the Arkansas Democrat, the first two paragraphs of which are typical, not only of the statement in its entirety, but of other articles appearing from time to time in the same publication:

"PEOPLE OF ARKANSAS vs. RACE-MIXING!

OFFICIAL POLICY OF THE STATE OF ARKANSAS

'The People of Arkansas assert that the power to operate public schools in the State on a racially separate but substantially equal basis was granted by the people of Arkansas to the government of the State of Arkansas; and that, by ratification of the Fourteenth Amendment, neither the State of Arkansas nor its people delegated to the federal government, expressly or by implication, the power to regulate or control the operation of the domestic institutions of

Arkansas; *any and all decisions of the federal courts or any other department of the federal government to the contrary notwithstanding.'*

WHOSE STATEMENT IS THE ABOVE?

It is the statement of Gov. Orval E. Faubus of Arkansas. It is the core of the Resolution of Interposition which he personally fathered. Governor Faubus hired the solicitors who circulated the petitions to place this Resolution on the ballot. Governor Faubus filed Resolution and petitions with the Secretary of State on July 5, 1956, and the Resolution was submitted to the people in last November's general election. THE PEOPLE OF ARKANSAS BY A TREMENDOUS, OVERWHELMING MAJORITY GAVE IT THEIR THUNDERING APPROVAL.

Sponsored by the Governor of Arkansas, adopted by a tremendous majority of Arkansas voters, THE ABOVE STATEMENT IS THE WILL OF THE PEOPLE OF ARKANSAS."

As September 3rd approached, the opposition to Negro children entering Central High School had stiffened and solidified. On the night of September 2d, Governor Faubus appeared on television in Little Rock and announced that in the interest of preserving peace, he had called out units of the National Guard, and had directed that the white schools be placed "off limits" to Negro students, and that the Negro schools be placed "off limits" to white students. The subsequent events, which ultimately brought forth United States troops, and the entry of the nine Negro children in Central High School, are found in our opinion in *Faubus* v. *United States, supra.*

The record firmly establishes that although the Negro children attended Central High School during the 1957–58 school term under the protection of Federal troops, and later, federalized national guardsmen, the opposition to the plan of integration by many members of the public, and particularly parents of white students, failed to sub-

side. Whether the white students who were the trouble makers, stood for segregation of the races in schools as the result of their environment over the years, or because of the intense campaign that was focused upon that issue by adults, does not appear, but the indisputable fact is that certain of the white students demonstrated their hostility to integration by overt acts of violence and misconduct, committed within the school building, as well as by destruction of school property through acts of vandalism. The events which occurred during the school year may be summarized as follows:

(1) Although there were no unusual events in the classrooms, there were a number of incidents in the halls, corridors, cafeteria and rest rooms, consisting mainly of "slugging, pushing, tripping, catcalls, abusive language, destruction of lockers, and urinating on radiators.

(2) Forty-three bomb threats necessitated searches of the school building, and particularly the lockers, some 2400 in number. These bomb threats were broadcast on the local radio and television stations, precipitating calls from parents and withdrawals of students for the day.

(3) Numerous small fires occurred within the building, particularly in rest rooms where tissue paper and towels accumulated.

(4) The destruction of school property throughout the school necessitated the expenditure of school funds, which might otherwise have been used for general maintenance purposes, to repair the damage.

(5) Misconduct on the part of some students resulted in approximately 200 temporary suspensions for short periods of time, and two permanent expulsions.

(6) The administrative staff in the school spent a great deal of time making reports of incidents, al-

leged and real, arising out of opposition to the presence of the nine Negro students.

(7) Teachers and administrative staff were subjected to physical and mental strain and telephone threats.

(8) Inflammatory anti-integration speeches were made at public meetings by speakers from other states, and the local newspapers carried many anti-integration articles.

(9) Vicious circulars were distributed condemning the District Court, the Supreme Court of the United States, and the school officials who recognized the supremacy of the Federal law.

(10) Vulgar cards, critical of the school officials, were given by adults to school children for distribution within the school building.

(11) In general there was bedlam and turmoil in and upon the school premises, outside of the classrooms.

Careful and critical analysis of the relevant facts and circumstances in light of applicable legal principles, leads us to the inescapable conclusion that the order of the District Court suspending the plan of integration can not stand.

In *Brown* v. *Board of Education*, 349 U. S. 294, the Supreme Court, in dealing with the manner in which integration should be effected, recognized that full implementation of the constitutional principles involved may require solution of varied local school problems—and that the school authorities have the primary responsibility for "elucidating, assessing, and solving the problems." While the District Courts, aided and guided by equitable principles, may properly take into account the public interest in the elimination of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in *Brown* v. *Board of Educa-*

tion, May 17, 1954, 347 U. S. 483, it should be emphasized that the Court, in the opinion dealing with the relief to be granted, stated (349 U. S. at page 300): "But it should go without saying that the vitality of these constitutional principles *cannot be allowed to yield simply because of disagreement with them.*" (Emphasis supplied.)

The precise question at issue herein, i. e., whether a plan of integration, once in operation, may lawfully be suspended because of popular opposition thereto, as manifested in overt acts of violence, has not received judicial consideration. But there is sound and convincing authority that a school board, "acting promptly and *completely uninfluenced by private and public opinion* as to the desirability of desegregation in the community," must proceed with deliberate speed, consistent with proper administration to abolish segregation. *Jackson* v. *Rawdon* (5 Cir. 1956) 235 F. 2d 93, 96; *certiorari denied* 352 U. S. 925; *School Board of the City of Charlottesville, Va.* v. *Allen* (4 Cir. 1956) 240 F. 2d 59, *certiorari denied*, 353 U. S. 910; and while ". . . a good faith acceptance by the school board of the underlying principle of equality of education for all children with no classification by race might well warrant the allowance by the trial court of time for such reasonable steps in the process of desegregation as appears to be helpful in avoiding unseemly confusion . . . [n]evertheless, whether there is such acceptance by the Board or not, the duty of the Court is plain. The *vindication of rights guaranteed by the Constitution can not be conditioned upon the absence of practical difficulties.*" (Emphasis supplied.) *Orleans Parish School Board* v. *Bush* (5 Cir. 1957) 242 F. 2d 156 at p. 166, *certiorari denied* 354 U. S. 921. "The fact that the schools might be closed if the order were enforced is no reason for not enforcing it," *Allen* v. *County School Board of Prince Edward County, Va.* (4 Cir. 1957) 249 F. 2d 462, 465, *certiorari denied* 355 U. S. 953, because, as the Court there stated, at page 465: "A person may not be denied enforcement of rights to which he is entitled under the Con-

stitution of the United States because of action taken or threatened in defiance of such rights."

In his opinion — F. Supp. —, which incorporated findings of fact and conclusions of law, Judge Lemley, who has most carefully and conscientiously considered the problem presented, recognized that the occurrences which motivated the instant proceeding were the direct result of general community opposition to integration. He stated:

> "From the practically undisputed testimony of the Board's witnesses we find that although the continued attendance of the Negro students at Central High School was achieved throughout the 1957–58 school year by the physical presence of federal troops, including federalized national guardsmen, *nevertheless on account of popular opposition to integration* the year was marked by repeated incidents of more or less serious violence directed against the Negro students and their property, by numerous bomb threats directed at the school, by a number of nuisance fires started inside the school, by desecration of school property, and by the circulation of cards, leaflets and circulars designed to intensify opposition to integration. . . ." (Emphasis added.)
>
> . . . . . .
>
> "It is important to realize, as is shown by the evidence, that the racial incidents and vandalism which occurred in Central High School during the past year did not stem from mere lawlessness on the part of the white students in the school, or on the part of the people of Little Rock outside the school; nor did they stem from any malevolent desire on the part of the students or others concerned to bomb the school, or to burn it down, or to injure or persecute as individuals the nine Negro students in the school. *Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of*

integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years. The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock, that the Brown Decisions do not truly represent the law, and that by virtue of the 1956–57 enactments, heretofore outlined, integration in the public schools can be lawfully avoided." (Emphasis supplied.)

". . . In reaching this conclusion we are not unmindful of the admonition of the Supreme Court that the vitality of those principles 'cannot be allowed to yield simply because of disagreement with them'; here, however, as pointed out by the Board in its final brief, the opposition to integration in Little Rock is more than a mere mental attitude; it has manifested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted."

Appalling as the evidence is—the fires, destruction of private and public property, physical abuse, bomb threats, intimidation of school officials, open defiance of the police department of the City of Little Rock by mobs—and the naturally resulting additional expense to the District, disruption of normal educational procedures, and tension, even nervous collapse of the school personnel, we cannot accept the legal conclusions drawn by the District Court from these circumstances. Over and over again, in the testimony, we find the conclusion that the foregoing turmoil, chaos and bedlam directly resulted from the presence of the nine Negro students in Central High School, and from this conclusion; it appears that the District Court found a legal justification for removing temporarily the disturbing influence, i. e., the Negro students. It is more accurate to state that the fires, destruction of property,

bomb threats, and other acts of violence, were the direct result of popular *opposition to* the presence of the nine Negro students. To our mind, there is a great difference from a legal standpoint when the problem in Little Rock is stated in this manner. From the record it appears that none of the Negro students was responsible for the incidents on the school property, and the one Negro expulsion seems to have resulted after the Negro student was physically struck in the face, following which it was found that the student had "failed to adjust", in violation of an agreement with the school board not to become embroiled in incidents.

This Court recognizes that, following the first *Brown* decision, the members of the Board, acting in good faith, and working with the Superintendent of Schools, moved promptly to promulgate a plan designed to gradually bring about complete integration in the Little Rock public schools, and they are to be commended for their efforts in that regard. We are also not unmindful of the difficulties which were faced by the board members and school administrators in attempting to give life to the plan of integration. As we have seen, they have been constantly harassed; they have met with overt opposition from the public, and the legislature through passage of the 1957 enactments. The executive department of the State of Arkansas has openly opposed their efforts, as demonstrated by the statement by the Governor of the official policy of the state of Arkansas against integration, followed by the use of National Guardsmen to prevent entry of Negro students. The result was to place the Board between "the upper and the nether millstone." See *Thomason* v. *Cooper*, 254 F. 2d 808 at page 810. While it may appear to the members of the Board and the Superintendent, that they have a thankless task, they may be recompensed by the knowledge that throughout, they, as public officers, have recognized their duty to support the Constitution of the United States, and to respect the

laws and courts of our Federal Government, and our democratic ideals, regardless of their personal convictions with respect to the wisdom of school integration.

It is not the province of this Court in this proceeding to advise the Board as to the means of implementing integration in the Little Rock Schools. We are directly concerned only with the legality of the order under review. We do observe, however, that at no time did the Board seek injunctive relief against those who opposed by unlawful acts the lawful integration plan, which action apparently proved successful in the Clinton, Tennessee and Hoxie, Arkansas situations. See *Kasper* v. *Brittain*, 245 F. 2d 92 (6 Cir. 1957), *certiorari denied* 355 U. S. 834, *rehearing denied* 355 U. S. 886; *Hoxie School District* v. *Brewer* (E. D. Ark.) 137 F. Supp. 364, *aff'd Brewer* v. *Hoxie School District* (8 Cir. 1956) 238 F. 2d 91. The evidence also affords some basis for belief that if more rigid and strict disciplinary methods had been adopted and pursued in dealing with those comparatively few students who were ring leaders in the trouble making, much of the turmoil and strife within Central High School would have been eliminated.

An impossible situation could well develop if the District Court's order were affirmed. Every school district in which integration is publicly opposed by overt acts would have "justifiable excuse" to petition the courts for delay and suspension in integration programs. An affirmance of "temporary delay" in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violence and unlawful means. The Supreme Court of the United States has specifically determined that segregation in the public schools is a deprivation of the equal protection of laws guaranteed by the Fourteenth Amendment. The Board, by public statement, has recognized its constitutional duty to provide non-segregated educational opportunities for the children of Little Rock; the District Court, in its memorandum opinion, *supra*, at page —,

stated: ". . . it is not denied that under the Brown decisions the Negro students in the Little Rock District have a constitutional right not to be excluded from any of the public schools on account of race;". Acting under a federal court order, the Board did proceed with a fair and reasonable program for gradual integration, which program had previously been approved by this Court. The issue plainly comes down to the question of whether overt public resistance, including mob protest, constitutes sufficient cause to nullify an order of the federal court directing the Board to proceed with its integration plan. *We say the time has not yet come in these United States when an order of a Federal Court must be whittled away, watered down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto.*

Mindful as we are that the incidents which occurred within Central High School produced a situation which adversely affected normal educational processes, we nevertheless are compelled to hold that such incidents are insufficient to constitute a legal basis for suspension of the plan to integrate the public schools in Little Rock. To hold otherwise would result in ". . . accession to the demands of insurrectionists or rioters . . .", *Strutwear Knitting Co.* v. *Olson*, 13 F. Supp. 384 at 391, and *Faubus* v. *U. S.*, 254 F. 2d 797 at 807, and the withholding of rights guaranteed by the Constitution of the United States. Accordingly, the order of the District Court is reversed, with directions to dismiss the appellees' petition.

GARDNER, *Chief Judge*, dissenting.

I would affirm on the grounds stated by Judge Lemley in his opinion. *Aaron* v. *Cooper*, E. D. Ark., — F. Supp. —.

Because of the limitation of time within which this case must be decided it is not possible to prepare a dissenting opinion and, hence, I am preparing only a short memorandum.

It is conceded that the school authorities have acted in good faith both in formulating a plan for integrating and in attempting to implement that plan. Their efforts in this regard were met with unprecedented and unforeseen opposition and resistance as set out and enumerated in the majority opinion. This opposition included acts of violence to such an unprecedented extent that the armed forces of the United States were stationed in and about the school building. The events pertinent to the attempts of the school authorities during the school year to implement its plan for integrating are set forth in the majority opinion. The normal conduct of the school was continuously disrupted and the state of mind, both within and without the school, was to a greater or lesser extent in a state of hysteria. Under circumstances and conditions set out in Judge Lemley's opinion the school authorities made application for an extension of time so as to permit a cooling off or breathing spell so that both pupils, parents, teachers and the public might to some extent become reconciled to the inevitable necessity for public school integration. Having in mind that the school officials and the teaching staff acted in good faith and that the school officials presented their petition for an extension of time in good faith, it was the duty of the court "to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles". *Brown* v. *Board of Education*, 349 U. S. 294. In this situation the action of Judge Lemley in extending the time as requested by the school officials was the exercise of his judicial discretion. The background is well set forth in Judge Lemley's opinion. For centuries there had been no intimate social relations between the white and colored races in the section referred to as the South. There had been no integration in the schools and that practice had the sanction of a decision of the Supreme Court of the United States as constitutionally legal. It had become a way of life in that section of the country and it is not strange that this long-established, cherished

practice could not suddenly be changed without resistance. Such changes, if successful, are usually accomplished by evolution rather than revolution, and time, patience, and forbearance are important elements in effecting all radical changes. The action of Judge Lemley was based on realities and on conditions, rather than theories. The exercise of his discretion should not, I think, be set aside as it seems to me it was not an abuse of discretion but rather a discretion wisely exercised under the conditions. We should not substitute our judgment for that of the trial court. Judge Lemley's decision is not without precedent in principle. It is, I think, warranted by the decision of the Supeme Court in *Brown* v. *Board of Education*, 349 U. S. 294. See also *Allen* v. *County School Board of Prince Edward County*, E. D. Va., — F. Supp. —; *Davis* v. *County School Board of Prince Edward County*, E. D. Va., 149 F. Supp. 431; *Wisconsin* v. *Illinois*, 278 U. S. 367, modified, 281 U. S. 179, 289 U. S. 395, 309 U. S. 569, 311 U. S. 107; *Standard Oil Co.* v. *United States*, 221 U. S. 1. It was the judgment of the school officials as indicated by their petition and, after hearing, the judgment of the trial court, that the extension of time requested should be granted. I do not think it can be said that the findings of the trial court and its conclusion based thereon are clearly erroneous. I would affirm.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,034.—SEPTEMBER TERM, 1957.

John and Thelma Aaron, minors, by their mother and next friend, (Mrs.) Thelma Aaron; et al., Appellants, *vs.* William G. Cooper, et al., Members of the Board of Directors of the Little Rock, Arkansas Independent School District, et al.	Appeal from the United States District Court for the Eastern District of Arkansas.

Opinion of this Court was filed and judgment entered August 18, 1958. Appellants, on August 20, 1958 filed a Motion for issuance of mandate forthwith and Appellees have today filed Application for Stay of Mandate pending proceedings in the Supreme Court of the United States.

These motions have been considered by the Court and it is hereby Ordered that Appellants' Motion for issuance of mandate is denied, and on application of appellees it is Ordered that the issuance of the mandate be, and it is hereby, stayed for a period of thirty days from and after this date, and if within said period there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until final disposition of this case by the Supreme Court.

August 21, 1958.

Office-Supreme Court, U.S.
FILED
AUG 27 1958
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

AUGUST SPECIAL TERM 1958

JOHN AARON, et al., PETITIONERS

v.

WILLIAM G. COOPER, et al.,
Members of the Board of Directors of
the Little Rock, Arkansas Independent
School District, and
VIRGIL T. BLOSSOM, Superintendent of
Schools RESPONDENTS

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

J. W. Fulbright hereby respectfully moves for leave to file a brief amicus curiae in the above entitled action.

The consent of the Attorneys for Petitioners and the consent of the Attorneys for the Respondents to file such brief, because of considerations of time, has neither been officially requested nor obtained.

Movant has reason to believe, however, that Respondents would not object to the filing of said brief amicus curiae.

The interest of the movant in this action arises from the fact that:

He is a citizen of the State of Arkansas whence this litigation arises;

He is an elected representative of the people of the State of Arkansas and has been such since 1942;

He is an educator, having occupied positions of responsibility in educational institutions and he

has served as President of the State University of Arkansas;

During his public life as a United States Representative from the Third Congressional District of Arkansas and as a United States Senator from the State of Arkansas his efforts have been directed toward the enhancement of education generally and he has advocated specific programs designed to bring about this result;

Movant has a deep and abiding conviction that only through the process of education can this nation hope to resolve many of the controversies with which it is presently confronted;

As a result of movant's experience as an elected representative of the people of the State of Arkansas in the Nation's Congress he has an understanding of his constituency, knowledge of prevailing local conditions, and an awareness of the mental and spiritual climate of the people of his State, all of which he believes would be of service to this Court in its consideration of the issues here presented;

Further, as a result of movant's personal and political background he is conversant with the social mores of the people of the South;

Also, because of movant's background in the aforementioned fields he feels able to present to this Court useful information which he believes would assist it in resolving the grave issues involved in this action;

Movant believes he is able to propose considerations which this Court might find valuable in resolving issues here presented;

Movant believes this case affects a far greater number of people than the actual parties litigant and believes he can present to the Court information of a helpful nature with regard to the interests of a majority of the people of Arkansas;

Movant is deeply troubled about the future peace and happiness of the people of his State and Nation of all races and creeds and believes the Court may derive benefit from his observations;

Movant states that time considerations do not permit absolute compliance with all technical requirements of the rules of this Court respecting filing of motions;

Movant, however, respectfully cites to this Honorable Court the language of Associate Justice Black as set forth in the order of this Court adopting its revised rules of procedure:

> "Finally, I have never favored the almost insuperable obstacles our rules put in the way of briefs sought to be filed by persons other than the actual litigants. Most of the cases before this Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against amicus curiae briefs."
>
> Order Adopting Revised Rules of the Supreme Court of the United States, 346 U. S. 945, 947 (1954).

Because of the unusual nature or the proceedings in this case and because of time element involved it is respectfully requested that this motion for leave to

file a brief as amicus curiae be granted even though strict compliance with the rules of this Court respecting filing of motions has been a practical impossibility.

Respectfully Submitted,

Lee Williams
Attorney for J. W. Fulbright
409 Senate Office Building
Washington 25, D. C.

August 27, 1958

IN THE SUPREME COURT OF THE UNITED STATES

AUGUST SPECIAL TERM 1958

JOHN AARON, et al., PETITIONERS

v.

WILLIAM G. COOPER, et al.,
Members of the Board of Directors of
the Little Rock, Arkansas Independent
School District, and
VIRGIL T. BLOSSOM, Superintendent of
Schools RESPONDENTS

ON APPLICATION FOR VACATION OF THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT STAYING THE EXECUTION OF ITS MANDATE AND FOR A STAY OF THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS OF JUNE 21, 1958

BRIEF OF J. W. FULBRIGHT AS AMICUS CURIAE

Lee Williams
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Washington 25, D. C.
Attorney for Amicus Curiae

August 27, 1958

IN THE SUPREME COURT OF THE UNITED STATES

AUGUST SPECIAL TERM 1958

JOHN AARON, et al — PETITIONERS

v.

WILLIAM G. COOPER, et al
Members of the Board of Directors of
the Little Rock, Arkansas Independent
School District, and
VIRGIL T. BLOSSOM, Superintendent of
Schools — RESPONDENTS

BRIEF OF J. W. FULBRIGHT AMICUS CURIAE

It is not the purpose here to burden the record of this Court by a lengthy repetition of the facts or the legal principles developed by the attorneys for the Respondents and in the opinions of the lower Courts. The indulgence of this Court is respectfully asked to hear an individual who is deeply troubled for the future peace and happiness of the people of Arkansas and of this nation, of all races and all creeds.

Special indulgence of this Court is requested to the arguments herein set forth, not because I am a legal expert or a social scientist, but simply because for more than fifty years, I have lived among the people of Arkansas, and for more than fifteen years, I have represented them in the Congress of the United States, from which experience I claim some intimate knowledge of local conditions

and of the mental and spiritual landscape against which the people of Arkansas live and move.

The people of Arkansas are as law abiding, as respectful of the traditions of our Anglo-Saxon heritage as are their fellow Americans; they abhor anarchy and disorder. In truth, until the recent violence, it had been thirty years since racial disorder had troubled the people of Arkansas.

From the complete destruction of their economy during the War between the States, the people of Arkansas have slowly rebuilt their fortunes and their standing in the Nation. It may be that they are more sensitive to criticism than is the average American.

By way of emphasis, I call the attention of this Court to certain considerations involved in the pending matter.

This Court has said the "Constitutional principle" involved in the decision of Brown v. Board of Education, 347 U.S. 483 (1954), "may require solution of varied local school problems." "... courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions ... the courts which originally heard these cases can best perform this judicial appraisal." Brown v. Board of Education, 349 U.S. 294, 299 (1955).

The Court directed that the district courts should be guided by equitable principles, which, it said, traditionally had been "characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." Id. at 300.

Judge Harry J. Lemley of the Federal District Court for the Eastern District of Arkansas is the Judge who is, in the words of the Court, in proximity to local conditions and he has found positively and unequivocally that the Little Rock School Board has in good faith attempted to comply with the rulings of this Court in the Brown decisions, Brown v. Board of Education, supra, but that conditions are so chaotic that a delay should be granted the Little Rock School Board in order to enable calmer spirits to find a way to conform to the principles enunciated by this Court.

A review of the decisions of Judge Lemley and the Eighth Circuit Court of Appeals leaves little doubt that the educational processes at Central High School were disrupted to an incalculable extent notwithstanding the good faith efforts of the School Board to comply with this court's general rule in the first Brown decision. See Aaron v. Cooper, Civil No. 3113, D. Ark., June 20, 1958; Aaron v. Cooper, Civil No. _____, 8th Cir., August 18, 1958.

Judge Lemley, in his attempt to interpret and carry out the mandate of this Court in the second Brown decision, determined that these disruptive conditions were intolerable. The Circuit Court of Appeals did not deny this. Indeed, the opinion of the court seems to reinforce it. In summarizing the eleven events of the school year, the court said that, in general, "there was bedlam and turmoil in and upon the school premises, outside of the classrooms." Aaron v. Cooper, Civil No. _____, 8th Cir., August 18, 1958. The court elsewhere, and in general, conceded that the normal educational processes were disturbed.

This Court in the first Brown decision, 347 U.S. 483 at 493, observed that "education is perhaps the most important function of state and local governments." If this is true, then is not the primary duty of the School Board that of providing proper public education? What more can the Board do than that which it has done, that is, to attempt in good faith to provide that which it is its duty to provide, and which it cannot do under these circumstances?

The Circuit Court of Appeals in its decision washed its hands of this question -- that is, how white and Negro children can be accorded public education in compliance with this Court's ruling in the first Brown decision, without "bedlam and turmoil."

"It is not the province of this Court," said the Circuit Court of Appeals, "... to advise the Board as to the means of implementing integration in the Little Rock Schools." Aaron v. Cooper, 8th Cir., supra. Whose province is it? Is it not the province of equity, to which this Court was committed by the second Brown decision, to adapt its statement of constitutional principles to the purposes, functions, and abilities of the institution to which those principles are suddenly to apply -- that is, the public school systems of the South?

What, indeed, is the purpose of entrusting equitable jurisdiction to local federal district courts, if it is not to permit an appraisal of what can be done to comply with the orders of this Court in the light of good faith efforts of local school boards?

The Circuit Court gave no answer to this dilemma.

"Mindful as we are that the incidents which occurred within Central High School produced a situation which adversely affected normal educational processes, we nevertheless are compelled to hold that such incidents are insufficient to constitute a legal basis for suspension of the plan to integrate. . . To hold otherwise would result in accession to the demands of insurrectionists or rioters." Aaron v. Cooper, 8th Cir., supra.

While this statement, which surely is the essence of the decision, has validity as a general rule, how can it be adapted as pointing a way out of the dilemma of the School Board? What guidance does it give to those who wish to abide by their duty to furnish adequate educational opportunities without defying this Court? Of what value is equitable jurisdiction if it cannot adapt the otherwise immutable law to the needs of the parties, the particular circumstances and the function of the institutions affected. This last, it should be remembered, is to provide adequate public education.

I suggest that the Circuit Court of Appeals was unduly preoccupied by the violent and unlawful acts of individual citizens and failed to give proper weight to the equitable nature of the proceeding and to the further fact that there was involved not simply the violence of individual citizens, but, in the words of an eminent commentator and historian, "a conflict between two sovereignties -- between the State government and the Federal Government." Washington Post and Times Herald, Aug. 26, 1958, p A13, Col. 3.

I believe it is true that this conflict "poses problems which go far beyond, and are quite different from, the problems of dealing with lawless mobs. They are problems which are insoluble by exhortation, or by Federal injunction and law suits in the Federal courts. For the essential issue is the refusal of lawful state governments to accept the validity of a Federal law." Ibid.

Chief Judge Archibald K. Gardner, of the Eighth Circuit Court of Appeals, in his dissenting memorandum observed that "the action of Judge Lemley was based on realities, and on conditions rather than theories." Aaron v. Cooper, 8th Cir., supra.

The meaningful realities of this situation are that due to unexpected developments of an unprecedented nature, this Court's original objective of procuring for Negro children education on an integrated basis cannot be provided under existing circumstances. Time is desperately needed to enable the authorities concerned to find an adjustment of this conflict.

No decision which this Court can make will assure the rights of the Negro children more effectively than those decisions which it has heretofore rendered. In spite of the full force of the executive power of the Federal government, even the use of the armed forces of the United States, the children did not and cannot enjoy a better, not even as good an, opportunity for education under the conditions of turmoil and bedlam which result from such extreme measures. The education of all children, white and Negro, suffers from such disturbed, abnormal conditions.

The argument that to accept the decision of the District Court for a delay of 2 1/2 years, is an abandonment of the integration decision of this Court is without merit. Such an argument takes no

account of the difference between the enunciation of constitutional doctrine, and the application of that doctrine through the principles of equity. More importantly, it takes no account of the obligation of the courts to adapt their powers to the purposes for which the institution or activity affected by those powers exists. This Court has stated, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Virginian Railway Co. v. Federation, 300 U. S. 515, 552 (1937).

It has become an axiom that the processes of education -- and in this country - public education -- offer the solution, if any is to be found, whereby men of different races may learn to abide one another, each in the full enjoyment of his rights. If this is agreed, then the systems of education must be respected, and social experimentation in them made tolerable to their purposes.

If I may repeat, this Court has observed that public education is the most important function of State and local government. Brown v. Board of Education, 347 U. S. 483, 493. To the extent that the school systems are successful, it is because local school boards, administrators, and teachers make them so. In this controversy, they are acknowledged to be men of good will. But if they

are not supported by the courts, when acting in good faith, how can men of good will be expected to continue to function? It can be expected that the control of local school boards will fall into the hands of radicals and fanatics. Then neither the processes of justice nor education would be served.

The Circuit Court of Appeals, in its opinion, had much to say about the activities of persons and governments outside this case. While these forces may be a part of the history of the case, and even if the Court deems them responsible for the present circumstances, neither their recollection, nor the courts despair of them, afford the School Board any solution to the problem of how to conduct public education in an acknowledged atmosphere of bedlam, and turmoil. The Court's refusal to support the good faith position of the Board can only intensify the effect of those outside forces. And, at least for the present, they are beyond the reach of this Court.

The Chief Judge of the Eighth Circuit Court of Appeals, in a passage of profound wisdom, said, "For centuries there had been no intimate social relations between the white and colored races in the section referred to as the South. There had been no integration in the schools and that practice had the sanction of a decision of the Supreme Court of the United States as constitutionally legal. It had become a way of life in that section of the country and it is not strange that this long-established,

cherished practice could not suddenly be changed without resistance. Such changes, if successful, are usually accomplished by evolution rather than revolution, and time, patience, and forebearance are important elements in effecting all radical changes." Aaron v. Cooper, 8th Cir., supra (dissenting memorandum).

That former Justice Brandeis of this Court would have agreed with the reasoning of Judge Gardner is evident from his statement in Goldman, The Words of Justice Brandeis, (1952) at p. 116: "No law can be effective which does not take into consideration the conditions of the community for which it is designed; no law can be a good law -- every law must be a bad law -- that remains unenforced."

The failure of the majority of the Circuit Court to take note of these truths in Judge Gardner's dissenting opinion, suggests that the members of the Court are not familiar with the traditions, the cultural patterns, the way of life of our Southern States. Indeed it seems clear that implicit in this whole matter is a tragic misunderstanding of fundamental human instincts and impulses.

The people of Arkansas endure against a background not without certain pathological aspects. They are marked in some ways by a strange disproportion inherited from the age of Negro slavery. The whites and Negroes of Arkansas are equally prisoners

of their environment. No one knows what either of them might have been under other circumstances. Certainly, no one of them has ever been free with respect to racial relationships in the sense that the Vermonter, say, has been free. The society of each is conditioned by the other's presence. Each carries a catalogue of Things Not To Be Mentioned. Each moves through an intricate ritual of evasions, of make-believe, and suppressions. In Arkansas, one finds a relationship among men without counterpart on this continent, except in similar Southern states. All this is the legacy of an ancient and melancholy history.

Under the circumstances, it is inevitable that there should have come into being what one might call a "Southern mind." And it is a grave error, it seems to me, to fail to realize that there is a Southern mind. G. M. Young, the English historian, observed that it was dangerous for Victorian England to fail to see that "time and circumstance had created an Irish mind;" and it was also dangerous to fail to learn "the idiom in which that mind ... expressed itself: and to understand that "what we could never remember, Ireland could never forget."

History tells us that race memories long endure. They are perpetuated in myths, and monuments, and a mother's lullaby. They are sentimental and emotional and when stirred up, they become irrational.

We are confronted here with a problem, novel and unprecedented in the history of our country and extraordinarily complex. In our congenital optimism, we Americans believe, or affect to believe, that social questions of the greatest difficulty may be solved through the discovery and application of a sovereign remedy that will forever dispose of the problem. Yet all this flies in the face of human experience. Thus, for example, a so-called Jewish problem has endured for more than 2000 years. The Roman Catholic-Protestant problem has similarly endured since the Reformation, and one might add that the Islam-Christian problem and the Hindu-Muslim problem, among many others, plague various groups of men in this and in other countries. Millions of lives have been sacrificed to these "problems" and the end is not yet.

I would suggest, then, that the problem of school integration in Arkansas is more likely -- bearing in mind that flesh and blood is weak and frail -- to yield to the slow conversion of the human heart than to remedies of a more urgent nature.

In this general context, we must observe a constant in the affairs of men. It is this: When their ancient social convictions are profoundly violated, or when sudden change is attempted to be imposed upon attitudes or principles deeply imbedded within them by inheritance, tradition, or environment, they are likely to react almost as by involuntary reflex, and often violently.

These reflections and the inferences which may be drawn therefrom, at least as they pertain to the problem which presently confronts this Court, recall to mind the words of a profound scholar, Morris R. Cohen, who wrote as follows:

"The clericalist and the legalist have an undue advantage in identifying their causes with those of religion and law, causes for which humanity is always willing to make extreme sacrifices. But that the identity is not complete is seen clearly in the career of Jesus of Nazareth. In the days of Jesus, both clericalism and legalism were represented by the Pharisees, who carried the legalist idea into religion, and wished to control all life by minute regulations similar to those which governed the life of the High-Priest. To make the life of every individual as holy as that of the High-Priest was indeed a noble ideal. Yet it was also deadening through the mass of casuistry to which it gave rise. Jesus's protest that the Sabbath was made for man, not man for the Sabbath, cuts the foundation of all legalism and clericalism. It makes us see the profound foolishness of those who, like Cato, would adhere to the law even though the Republic be thereby destroyed. Without a legal order and some ministry of religious insight, the path to anarchy and worldliness is indeed dangerously shortened. But without a realization of the essential limitations of legalism and clericalism, there is no way of defending the free human or spiritual life from fanaticism and superstition."

M. R. Cohen, Law and the Social Order; Essays in Legal Philosophy, p. 160-161 (1933).

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For the reasons herein set forth, it is urged that this Court deny the application of Petitioners.

Respectfully submitted,

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August 27, 1958

Office-Supreme Court, U.S.
FILED
AUG 26 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958

JOHN AARON, et al.,

Petitioners

V.

WILLIAM G. COOPER, et al., Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, and Virgil T. BLOSSOM, Superintendent of Schools,

Respondents

Misc. No. 1

RESPONSE TO APPLICATION FOR VACATION OF ORDER OF COURT OF APPEALS FOR EIGHTH CIRCUIT STAYING ISSUANCE OF ITS MANDATE, FOR STAY OF ORDER OF DISTRICT COURT OF EASTERN DISTRICT OF ARKANSAS AND FOR SUCH OTHER ORDERS AS PETITIONERS MAY BE ENTITLED TO.

TO THE UNITED STATES SUPREME COURT:

The respondents state that the application of petitioners to vacate the stay granted by the Eighth Circuit Court of Appeals should be denied for the following considerations:

1. As is illustrated by the order entered in the case of Tureaud v. Board of Supervisors, 346 U.S. 881, cited by petitioners, preservation of the status quo is not the object of a stay. Rather, it is a question of preserving appellate jurisdiction and balancing the competing equities of the parties together with the possible injury to the public interest. This court has recognized, by Rule 27, that the judges of the courts of appeals are familiar with the facts in their cases and are in a better position than this court to grant stays in appropriate circumstances. In the case cited by petitioners, Lucy v. Adams, 350 U.S. 1, there existed no substantial question of law, and

at the time no sound reasons for suspending the injunction. Here the respondents' case involves grave and as yet unsettled legal questions not fully reflected in the opinion of the Eighth Circuit Court of Appeals although obviously considered in granting respondents' application for a stay.

2. Judge Harry J. Lemley of the United States District Court for the Eastern and Western Districts of Arkansas, in an exhaustive memorandum opinion, made findings of fact which were accepted by the Eighth Circuit Court of Appeals and not seriously disputed by the petitioners. Judge Lemley found, among other things, that if Central High School were opened on an integrated basis this September, the emotional pitch of the community, resolved into action, would be such as to require troops or their equivalent to maintain order; that the school district is financially unable to hire an adequate number of persons to maintain order and protect the school from property damage; that the board has at all times acted in good faith in the face of overwhelming difficulties; that, with demoralization of students and faculty and destruction of the educational program the existing situation is intolerable; that without a reasonable postponement of the desegregation plan irreparable harm will be inflicted upon the school system and students of both races; that the petitioners will in fact be benefited by the stay because physical danger to them would thereby be removed and because the high school to which they would go is, according to the North Central Association of Colleges and Secondary Schools, equal to Central High School; that the school board has not been lax in its implementation of desegregation in that it does not have a duty to enforce criminal laws or the public peace generally. In connection with the last mentioned finding, it should be noted that the petitioners themselves have instituted no punitive or injunctive proceedings, even though they have a legal right and adequate resources to do so. In brief, from and after the unexpected events of September, 1957, the school board,

according to the findings of the district court, continued to operate the school as best it could under the injunction ordering desegregation but, in the emotional climate existing then and now, was subjected to unfettered harassment, interference and agitation which will lead inexorably toward destruction of the Little Rock school system--once the pride of the community.

3. The respondents submit that the Eighth Circuit Court of Appeals acted within the bounds of their sound discretion in granting the stay. This determination, made on the basis of the complete record and findings of fact as presented, should not be disturbed by this court. As was said in Mills v. Lowndes, 26 F. Supp. 792, 803 (D. Md. 1939): "The right to a stay is not absolute but lies in sound judicial discretion, and it may properly be withheld where it will do the plaintiff relatively little good and the defendant great harm. . . . The issuance of the injunction in this case would be futile for any direct legal benefit to the plaintiff, and it would be very detrimental to elementary school education. . . ." See also Cumming v. Board of Education, 175 U.S. 528, 544-545, where Justice Harlan denied an injunction because "the result would only be to take from white children educational privileges enjoyed by them, without giving colored children additional opportunities for the education furnished in high schools." In this situation, if the petitioners' application is denied then, regardless of result upon final disposition of the case, their high school education will not be interrupted and in fact they will be spared the predictable mental torment and physical danger that would accompany attendance at Central High School in September. On the other hand, if petitioners' application is granted, the school board for the reasons reflected in the findings of the district court will be unable to operate Central High School on an integrated basis under conditions as they now exist in Little Rock. Perhaps the matter of greatest importance will be the irreparable harm done to

the education of 2,000 students at Central High School and more than 21,000 students throughout the Little Rock School District. If this court vacates the stay it would indeed be the equivalent of affirmance of the Eighth Circuit Court of Appeals. The board requested and received from the district court a two and one-half year postponement on the basis of "declining necessity." That is, the situation is now an intolerable one but at the end of the two and one-half year period conditions should be clarified. Various elements entered into this time factor. It is reasonable to presume that by the end of the requested two and one-half year period a national policy will have been established. By then state laws purporting to override the Brown decisions will have been tested in the courts. The present highly emotional atmosphere, which has proven conducive to violence, should have subsided. And perhaps in the period of calm the people can and will find a better understanding of the nature of the problems confronting them and, consequently, the direction in which the solutions lie. Certainly irreparable harm will result if this court vacates the stay.

WHEREFORE, respondents pray that the petitioners' application to vacate the stay granted by the Eighth Circuit Court of Appeals pending the filing in this court of a petition for writ of certiorari be dismissed; and for all other proper relief.

Respectfully Submitted,

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Attorneys for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

August Special Term
1958

JOHN AARON, et al.,	)	
	)	
Petitioners	)	
	)	
vs.	)	Misc. No.
	)	
WILLIAM G. COOPER, et al., Members of The Board of Directors of the Little Rock, Arkansas Independent School District, and VIRGIL T. BLOSSOM, Superintendent of Schools,	)	
	)	
Respondents.	)	

MOTION FOR LEAVE TO FILE BRIEF FOR PETITIONERS

Now come the petitioners and respectfully move for leav

to file the Brief for Petitioners hereto annexed.

Respectfully submitted,

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New York 19, New York

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Attorneys for Petitioners

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IN THE

SUPREME COURT OF THE UNITED STATES

August Special Term
1958

JOHN AARON, et al.,	)	
Petitioners	)	
vs.	)	Misc. No. 1
WILLIAM G. COOPER, et al., Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and VIRGIL T. BLOSSOM, Superintendent of Schools,	)	
Respondents.	)	

BRIEF FOR PETITIONERS

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Respondents.	)	

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the Court of Appeals for the Eighth Circuit and the District Court for the Eastern District of Arkansas are not reported. Copies of these opinions and the orders of both courts are filed herewith as Petitioners' Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1651 and 2106; and the general supervisory powers of this Court over lower federal courts.

QUESTION PRESENTED

Whether a decree of the District Court approved by the Court of Appeals requiring gradual integration of public schools, which plan has been in effect for a year, may be suspended by order of a District Judge or order of Court of Appeals staying its mandate after having reversed said order of the District Judge.

STATEMENT OF THE CASE

The facts in this case are adequately set forth in the opinion of the Court of Appeals and are therefore not set forth here. Two days after said opinion was filed, on August 20, 1958, petitioners filed a motion in the United States Court of Appeals for the Eighth Circuit requesting that the mandate in said case be issued forthwith. On the following day respondents filed a motion for stay of issuance of the mandate and on the same date, August 21, 1958, the United States Court of Appeals, without allowing the petitioners the five days' opportunity to file a brief in opposition as provided by Rule 18 (b) of the Rules of the United States Court of Appeals for the Eighth Circuit, granted respondents' application for stay of the mandate in said cause for a period of thirty days from said date and further ordered that, if

within the period of thirty days it receives notice from the Clerk of the Supreme Court that an application for certiorari has been filed, the stay is continued until said application is finally disposed of. Copy of said stay is set forth in Appendix to this brief.

On August 22, 1958, petitioners filed their application For Vacation Of Order of Court of Appeals For Eighth Circuit Staying Issuance of Its Mandate, For Stay of Order of District Court of Eastern District of Arkansas and For Such Other Orders As Petitioners May Be Entitled To.

On August 25, 1958, this Court issued an order for a Special Term called to hear argument of said application.

ARGUMENT

THE STATUS-QUO OF SCHOOL DESEGREGATION PURSUANT TO COURT ORDER SHOULD NOT BE DISRUPTED EITHER BY ORDER OF THE DISTRICT COURT OR STAY OF MANDATE BY THE COURT OF APPEALS.

The Court may take judicial notice of the fact that the next school term at Little Rock Central High School is to commence on September 8. In denying the petition for writ of certiorari in order to permit the Court of Appeals to consider the issues involved, this Court stated that it had "no doubt that the Court of Appeals will recognize the vital importance of the time element in this litigation, and that it will act upon the application for a stay or the appeal in ample time to permit arrangements to be made for the next school year."

But in the present posture of these proceedings, despite an opinion of the Court of Appeals deciding the right of petitioners to continue in nonsegregated schools, petitioners will be relegated back to segregated schools for at least a year. Thus, respondents have effectively secured the relief they originally sought--a suspension of desegregation for an undetermined duration.

Petitioners' right to attend unsegregated schools has long since been settled, Aaron v. Cooper, 143 F.Supp. 855 (E.D. Ark 1956), aff'd 243 F2d 361 (8th Cir. 1957) and petitioners have in fact attended an unsegregated school for one year. The only issue in this case is whether respondents are entitled under the circumstances presented here to an order suspending the rights of petitioners for any period of time. The court below has effectively decided this issue by issuing a stay. If that stay is allowed to stand until September 8, 1958, it will for all purposes constitute a final disposition of the only issue in this case.

I

While a federal court has power to issue or deny stays of its own judgments, this Court has consistently defined and limited that power by the application of certain standards. Virginian R. Co. v. United States, 272 U.S. 658,672; United States v. State of Ohio, 291 U.S. 644; Lucy v. Adams, 350 U.S. 1; United States v. United Liquor Corp. 1 L. ed. 2d 32 (1956); Tureaud v. Board of Supervisors of Louisiana State Univ., 346 U.S. 882. Considerations governing the issuance of a

stay were set forth in detail in the Virginian case. There a carrier sued to restrain the enforcement of an ICC order abolishing discriminatory rates. A three-judge district court refused to issue the injunction and gave judgment for defendant, but stayed the enforcement of the ICC order pending appeal. This Court vacated the stay and held that a judgment of this kind creates a presumption of its own correctness, a presumption which ordinarily entitled the prevailing party and the public to the benefits the order was intended to secure. Mr. Justice Brandeis, writing for the court, stated at 573:

> In this class of cases [where a final decree has been rendered denying an injunction] an appeal bond can rarely indemnify fully even private parties to the litigation for the loss of the benefits of which the stay deprived them; and the public would usually be left wholly remediless. To justify granting the stay after a final decree sustaining the Commission's order, it must appear either that the district court entertains a serious doubt as to the correctness of its own decision; or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this court. 1/

1/ On similar facts, this Court in United States v. Ohio, 291 U.S. 644, citing the Virginian case, vacated a stay, even before the appeal was heard. See also: Breswick v. United States, 1 L. ed. 2d 1510, 1513.

More recently, in United States v. United Liquor Corp., 1 L. ed 2d 32, 33 (1956), Mr. Justice Reed wrote in chambers:

> Weighing the economic harm and the "fear" of future irreparable injuries flowing to defendants from the existence of the decree, during the pendency of their direct appeal to this Court, against the public detriment which would result from a continuation of unlawful price fixing, the motion for a stay is denied. Cf. Yakus v. United States, 321 US 414, 440, 441, 88 L. ed. 834, 857, 858, 64 S. Ct. 660.

The English precedents similarly hold that where there are no serious doubts about the correctness of a decision a stay will be denied where its imposition would prejudice the prevailing party[2] and that an important consideration in the decision of whether a stay should be granted is the desirability of preserving the status quo of the parties.[3]

2/ See A. G. v. Murdock (1852) 21 L.J. Ch. 694; 19 L.T. O.S. 173, L.JJ ("I do not see that the rights of those in whose favor a decree has been twice pronounced should be delayed."); Penn v. Bibby (1866) L.R. 3 Eq. 308; 36 L.J. Ch. 277; 15 W.R. 192 ("It is a patent matter, and it is of very great importance (for the patent has only two years to run) that there should be no such delay as need be occasioned if I suspended the decree.")

3/ Boskell v. Whitworth (1871) 19 W.R. 804 L. JJ ("If there is a bona fide intention to take the opinion of the Court upon it, it is not usual that things should remain otherwise than in statu quo."); Attorney General v. Munro, 11 L.T.O.S. 197; 12 Jur. 318, L.C. (1848) ("By enforcing the injunction, the Court would be turning one clergyman and one congregation out one week to introduce another clergyman and another congregation who may be displaced the next week. It will be best that the services of the defendant should be continued some short time longer, until the appeal has been decided.")

In the instant case, the Court of Appeals entertained no doubts as to the correctness of its own decision. In fact, it stated categorically:

> An affirmance of "temporary delay" in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violence and unlawful means.

Nor can the stay be justified by balancing the harm to the parties. Indeed, the Court of Appeals itself, in deciding this case on the merits, held:

> Mindful as we are that the incidents which occurred within Central High School produced a situation which adversely affected normal educational processes, we nevertheless are compelled to hold that such incidents are insufficient to constitute a legal basis for suspension of the plan to integrate the public schools in Little Rock. To hold otherwise would result in "*** accession to the demands of insurrectionists or rioters ***", Strutwear Knitting Co. v. Olson, 13 F.Supp. 384 at 391, and Faubus v. U.S., 254 F. 2d 797 at 807, and the withholding of rights guaranteed by the Constitution of the United States.

The only issue before this Court is whether respondents are entitled, to a suspension of desegregation already in progress. If Judge Lemley's order remains in effect until the opening of school petitioners will be returned to segregated schools for at least one year and respondents will have secured the relief they sought. The rights of those petitioners who are scheduled to graduate from high

school next year will be permanently and effectively nullified.[4/]

Certainly the stay issued by the court below cannot be justified as an exercise of the traditional function of preserving the status quo pending appeal, for, the issuance of the stay achieved the opposite effect. It disrupted the status quo by excluding petitioners from the schools they attended during the past year. The refusal of the district court to stay its order accomplished the same result.

In the area immediately under consideration this Court has twice ruled that the grant or denial of a stay should not be allowed to defer clear constitutional rights to nonsegregated education. Lucy v. Adams, supra; Tureaud v. Board of Supervisors of Louisiana State University, supra. In the Lucy case, a motion to vacate the suspension of and to reinstate the order of the United States District Court for the Northern District of Alabama, enjoining state university officials from denying petitioner's admission solely on account of race or color was addressed to Mr. Justice Black as Circuit Justice for the Fifth Circuit. In a per curiam opinion this Court, after reciting the facts, held that "[t]he motion is granted and the injunction is reinstated to the extent that it enjoins and restrains the respondent and others designated from denying these petitioners, Autherine Lucy and Polly Ann Myers, the right to enroll in the University of Alabama and pursue

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4/. The considerations cited in the Virginian case which militated against the stay are of even greater force here where petitioner is not protected even by the posting of an appeal bond, which the State of Arkansas, because it is a state, need not deposit.

courses of study there. Sipuel v. University of Oklahoma, 332 U.S. 631, 92 L. ed 247, 68 S Ct 299; Sweatt v. Painter, 339 U.S. 629 94 L. ed 1114, 70 S Ct 848; McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637, 94 L ed 1149, 70 S Ct 851" [pp 1-2]

In the Tureaud case, the relator had been ordered admitted to Louisiana State University by the United States District Court for the Eastern District of Louisiana. The Court of Appeals reversed and refused to stay its judgment. An order of this Court stayed the judgment of the Court of Appeals pending final disposition of the petition for writ of certiorari filed in this Court. It will be noted that the petition was later granted, 347 U.S. 971.

There can be no question of the power of this Court to stay judgments or vacate stays of judgment of lower federal courts, United States v. United Liquor Corp., 1 L.ed 2d 33 (1956); Lucy v. Adams, 350 U.S. 1; Tureaud v. Board of Supervisors, 346 U.S. 886; Rosenberg v. U.S. 346 U.S. 273, 279; Scripps-Howard Radio v. Federal Communication Comm. 316 U.S. 4,9-10; United States v. Ohio, 291 U.S. 644; Virginian R. Co. v. United States, 272 U.S. 658, 672; In the Matter of Classen 140 U.S. 198, 208. This Court also has authority to issue a stay suspending an order of an inferior tribunal, pending appeal from the decision of an intermediate court. See Omaha and Council Bluff Street Ry Co. v. Interstate Commerce Commission, 222 U.S. 582 (suspending order of the I.C.C. pending appeal); Virginian R. Co. v. United States 272 U.S. 658, 670

Thus it is clear that the procedural device of granting or denying a stay cannot be employed where the result will be to delay or nullify the exercise of clearly determined rights. This Court has frequently exercised its authority to prevent such unjust results and, petitioner submits, nowhere is the exercise of this Court's authority more imperative to preserve constitutional rights than in the instant case - if the stay order is permitted to stand and Judge Lemley's order remains in force petitioners' rights will be effectively destroyed, the damage will be irreparable and the order of a Federal Court will in fact "be whittled away."

CONCLUSION

WHEREFORE, it is respectfully submitted, petitioners' application should be granted.

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Wiley Branton
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Pine Bluff, Arkansas

Attorneys for Petitioners

Of Counsel
William Coleman, Jr.
Irma Robbins Feder
Jack Greenberg
William Taylor

CERTIFICATE OF SERVICE

THURGOOD MARSHALL, attorney for petitioners herein, hereby certifies that copies of the attached Brief for Petitioners were delivered to Richard C. Butler, Esq., in the District of Columbia on this date.

THURGOOD MARSHALL

Dated: _____ day of August 1958.

Office Supreme Court, U.S.
FILED
AUG 27 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

August Special Term
1958

JOHN AARON, et al.,

Petitioners

vs. Misc. No. 1

WILLIAM G. COOPER, et al., Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and VIRGIL T. BLOSSOM, Superintendent of Schools,

Respondents.

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the Court of Appeals for the Eighth Circuit and the District Court for the Eastern District of Arkansas are not reported. Copies of these opinions and the orders of both courts are filed herewith as Petitioners' Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1651 and 2106; and the general supervisory powers of this Court over lower federal courts.

QUESTION PRESENTED

Whether a decree of the District Court approved by the Court of Appeals requiring gradual integration of public schools, which plan has been in effect for a year, may be suspended by order of a District Judge or order of Court of Appeals staying its mandate after having reversed said order of the District Judge.

STATEMENT OF THE CASE

The facts in this case are adequately set forth in the opinion of the Court of Appeals and are therefore not set forth here. Two days after said opinion was filed, on August 20, 1958, petitioners filed a motion in the United States Court of Appeals for the Eighth Circuit requesting that the mandate in said case be issued forthwith. On the following day respondents filed a motion for stay of issuance of the mandate and on the same date, August 21, 1958, the United States Court of Appeals, without allowing the petitioners the five days' opportunity to file a brief in opposition as provided by Rule 18 (b) of the Rules of the United States Court of Appeals for the Eighth Circuit, granted respondents' application for stay of the mandate in said cause for a period of thirty days from said date and further ordered that, if

within the period of thirty days it receives notice from the Clerk of the Supreme Court that an application for certiorari has been filed, the stay is continued until said application is finally disposed of. Copy of said stay is set forth in Appendix to this brief.

On August 22, 1958, petitioners filed their application For Vacation Of Order of Court of Appeals For Eighth Circuit Staying Issuance of Its Mandate, For Stay of Order of District Court of Eastern District of Arkansas and For Such Other Orders As Petitioners May Be Entitled To.

On August 25, 1958, this Court issued an order for a Special Term called to hear argument of said application.

ARGUMENT

THE STATUS-QUO OF SCHOOL DESEGREGATION PURSUANT TO COURT ORDER SHOULD NOT BE DISRUPTED EITHER BY ORDER OF THE DISTRICT COURT OR STAY OF MANDATE BY THE COURT OF APPEALS.

The Court may take judicial notice of the fact that the next school term at Little Rock Central High School is to commence on September 8. In denying the petition for writ of certiorari in order to permit the Court of Appeals to consider the issues involved, this Court stated that it had "no doubt that the Court of Appeals will recognize the vital importance of the time element in this litigation, and that it will act upon the application for a stay or the appeal in ample time to permit arrangements to be made for the next school year."

But in the present posture of these proceedings, despite an opinion of the Court of Appeals deciding the right of petitioners to continue in nonsegregated schools, petitioners will be relegated back to segregated schools for at least a year. Thus, respondents have effectively secured the relief they originally sought--a suspension of desegregation for an undetermined duration.

Petitioners' right to attend unsegregated schools has long since been settled, Aaron v. Cooper, 143 F.Supp. 855 (E.D. Ark 1956), aff'd 243 F2d 361 (8th Cir. 1957) and petitioners have in fact attended an unsegregated school for one year. The only issue in this case is whether respondents are entitled under the circumstances presented here to an order suspending the rights of petitioners for any period of time. The court below has effectively decided this issue by issuing a stay. If that stay is allowed to stand until September 8, 1958, it will for all purposes constitute a final disposition of the only issue in this case.

I

While a federal court has power to issue or deny stays of its own judgments, this Court has consistently defined and limited that power by the application of certain standards. Virginian R. Co. v. United States, 272 U.S. 658,672; United States v. State of Ohio, 291 U.S. 644; Lucy v. Adams, 350 U.S. 1; United States v. United Liquor Corp. 1 L. ed. 2d 32 (1956); Tureaud v. Board of Supervisors of Louisiana State Univ., 346 U.S. 862. Considerations governing the issuance of a

stay were set forth in detail in the Virginian case. There a carrier sued to restrain the enforcement of an ICC order abolishing discriminatory rates. A three-judge district court refused to issue the injunction and gave judgment for defendant, but stayed the enforcement of the ICC order pending appeal. This Court vacated the stay and held that a judgment of this kind creates a presumption of its own correctness, a presumption which ordinarily entitled the prevailing party and the public to the benefits the order was intended to secure. Mr. Justice Brandeis, writing for the court, stated at 673:

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There can be no question of the power of this Court to stay judgments or vacate stays of judgment of lower federal courts, United States v. United Liquor Corp., 1 L.ed 2d 33 (1956); Lucy v. Adams, 350 U.S. 1; Tureaud v. Board of Supervisors, 346 U.S. 886; Rosenberg v. U.S. 346 U.S. 273, 279; Scripps-Howard Radio v. Federal Communication Comm. 316 U.S. 4,9-10; United States v. Ohio, 291 U.S. 644; Virginian R. Co. v. United States, 272 U.S. 658, 672; In the Matter of Classen 140 U.S. 198, 208. This Court also has authority to issue a stay suspending an order of an inferior tribunal, pending appeal from the decision of an intermediate court. See Omaha and Council Bluff Street Ry Co. v. Interstate Commerce Commission, 222 U.S. 582 (suspending order of the I.C.C. pending appeal); Virginian R. Co. v. United States 272 U.S. 658, 670

Thus it is clear that the procedural device of granting or denying a stay cannot be employed where the result will be to delay or nullify the exercise of clearly determined rights. This Court has frequently exercised its authority to prevent such unjust results and, petitioner submits, nowhere is the exercise of this Court's authority more imperative to preserve constitutional rights than in the instant case - if the stay order is permitted to stand and Judge Lemley's order remains in force petitioners' rights will be effectively destroyed, the damage will be irreparable and the order of a Federal Court will in fact "be whittled away."

CONCLUSION

WHEREFORE, it is respectfully submitted, petitioners' application should be granted.

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THURGOOD MARSHALL

Dated: _____ day of August 1958.

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vs.)

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Respondents.)

APPENDIX TO PETITIONERS' BRIEF

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IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

JOHN AARON, ET AL,

Plaintiffs

vs.

Civil Action
No. 3113

WILLIAM G. COOPER, ET AL,
Members of the Board of Directors
of the Little Rock, Arkansas
Independent School District, and
VIRGIL T. BLOSSOM, Superintendent
of Schools,

Defendants

MEMORANDUM OPINION

This cause is now before the Court upon the petition of the defendants, members of the School Board of Little Rock, Arkansas, and the Superintendent of Schools, for an order permitting them to suspend until January, 1961, the operation of the plan of gradual racial integration in the Little Rock public schools, which plan was adopted by the Board in 1955, and was approved by the Court in 1956, the Court of Appeals affirming. Aaron v. Cooper, DC, Ark., 143 F. Supp. 855, aff'd., 8 Cir., 243 F2d 361. This petition has been tried to the Court and the Court having considered the pleadings, briefs and evidence, and being well and fully advised, doth file this memorandum opinion, incorporating herein its findings of fact and conclusions of law.

In order that the issues tendered by the Board's petition may be intelligently understood, a brief history of this litigation is desirable:

Prior to the decisions of the Supreme Court of the United States in the Brown cases (Brown v. Board of Education, 347 U.S. 483, and 349 U.S. 294) the public school system in Little Rock, like all other public school systems in the State of Arkansas, was operated on a racially segregated basis. A few days after the first Brown decision was rendered the Board announced that it was commencing studies looking toward the establishment of an integrated school system; and in 1955, a few days prior to the rendition of the second Brown decision, the Board announced a plan of gradual integration extending over a period of years, the plan to go into operation with respect to the high school

grades at the commencement of the 1957-58 school year.[1]

Thereafter, the plaintiffs in this case, who are Negro children of school age residing within the Little Rock School District, commenced a class action against the members of the Board and the Superintendent of Schools attacking the plan. The case was tried by Judge John E. Miller of Ft. Smith, who was sitting in the Eastern District of Arkansas under a special assignment. As indicated, the plan was approved, and the Court dismissed the prayer of the complaint for declaratory and injunctive relief, and retained jurisdiction of the case for the purpose of entering such other and further orders as might be necessary to obtain the plan's effectuation.[2]

At the time the plan was adopted, the Board recognized that the vast majority of the people of Little Rock was opposed to integration, but it was felt by the Board that the plan would be acceptable as the best one obtainable under the circumstances, and that it would be workable if put into operation in September, 1957. As time went on, however, opposition to integration increased in intensity not only in Little Rock but throughout the State as a whole, as is shown by the fact that in the general election in November, 1956, the people of the State by substantial majorities adopted: (a) Amendment No. 44 to the Arkansas Constitution of 1874, which amendment directed the Arkansas Legislature to take appropriate action and pass laws opposing "in every Constitutional manner " the decisions of the Supreme Court in the Brown cases; (b) A resolution of interposition which, among other things, called upon the people of the United States and the governments of all of the separate states to join the people of Arkansas in securing the adoption of an amendment to the Constitution of the United States, which would provide that the powers of the federal government should not be construed to extend to the regulation of the public schools of any state, or to include a prohibition to any state to provide for the maintenance of racially separate but substantially equal public schools within such state; (c) A pupil assignment law dealing with the assignment of individual pupils to individual public schools.

And the 61st General Assembly, which met in January, 1957, passed four statutes, one of which established a State Sovereignty Commission; another of which relieved school children of compulsory attendance in racially mixed public schools; the third of which required certain persons and organizations engaged in certain activities,

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1. The plan is set out verbatim and thoroughly discussed in the district court's opinion in Aaron v. Cooper, supra.

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2. In the very recent case of Thomason v. Cooper, et al, 8 Cir., __ F2d__, a phase of this litigation, as will hereinafter appear, the Court of Appeals in construing Judge Miller's decree, said that in effect it ordered the Board to put the plan into operation at the beginning of the 1957-58 school year.

****

including those affecting integration, to register with and make periodic reports to the State Sovereignty Commission; and the fourth of which authorized local school boards to expend district funds in employing counsel to assist them in the solution of problems arising out of integration.

In August, 1957, Mrs. Clyde Thomason, a white person, filed a suit against the Board and the Superintendent in the Chancery Court of Pulaski County, the purpose of which suit was to enjoin them from putting the plan into operation; that suit was based, in part at least, upon the legislation heretofore mentioned. A hearing was held before the Chancellor, and on August 29, 1957, a temporary restraining order was issued. At that time Judge Ronald N. Davies of Fargo, North Dakota, was sitting in the Eastern District of Arkansas under special assignment, and on August 30, upon the application of the Board in this cause, he enjoined further proceedings by the plaintiff in the state court litigation. His decision was appealed, and he was affirmed. Thomason v. Cooper, supra.

The 1957-58 school year was due to commence on September 3, 1957, and the Board had arranged to enroll nine Negro students in the formerly all-white Central High School pursuant to the plan. On the night of September 2, however, the Governor of the State of Arkansas announced that in the interest of preserving the public peace and tranquility he had called out units of the Arkansas National Guard and had directed that the white schools be placed "off limits" to Negro students, and that the Negro schools be placed "off limits" to white students. The Board, learning of the Governor's action, requested the nine Negro students not to attempt to enter the school the following day, and on the morning of September 3 the Board applied to Judge Davies for instructions. As a result of that application Judge Davies entered an order on the same day directing the Board to put its plan of integration into operation "forthwith."

On September 4 the Negro students attempted to enter the school but were turned away by the national guardsmen. The next day the Board filed a petition for a temporary suspension of the operation of the plan, which petition upon a hearing by Judge Davies was denied.

On September 9, 1957, Judge Davies entered an order inviting the Government to come into the case as amicus curiae and to commence injunction proceedings against the Governor and his subordinates "to prevent the existing interferences with and obstructions to the carrying out of the orders heretofore entered by this Court in this case." Thereupon the Government intervened, and after a hearing held on September 20, a preliminary injunction was entered restraining the Governor, the Adjutant General of the State of Arkansas, and the Unit Commander of the guardsmen on duty from "(a) obstructing or preventing by means of the Arkansas National Guard, or otherwise, Negro students eligible under said plan of school integration to attend the Little Rock Central High School, from attending said school or (b) from threatening or coercing said students not to attend said school or (c) from obstructing or interfering in any way with the carrying out and effectuation of this Court's orders of August 28, 1956 and September 3, 1957, in this case, or (d) from otherwise obstructing or interfering with the constitutional right of said Negro children

to attend said school." See Aaron v. Cooper, DC, Ark., 156 F. Supp. 220.

The Governor obeyed the order entering the temporary injunction just mentioned, while at the same time prosecuting an appeal therefrom and withdrew the national guardsmen. Judge Davies' decision in question was affirmed by the Court of Appeals on April 28 of the current year. Faubus et al v. United States et al., 8 Cir., __F2d__. On Monday, September 23, the Negro students entered Central High School under the protection of the police department of the City of Little Rock and of certain members of the Arkansas State Police. A large and demonstrating crowd, however, had gathered around Central High School, which crowd the officers on duty could hardly control, and they advised the Superintendent to remove the Negro children from the school which was done.

A short time later the Negro students were readmitted to the school under the protection of combat troops of the regular United States Army which the President sent into Little Rock for that purpose, and eight of these students remained enrolled for the balance of the school year which closed on May 28, 1958. During the entire school year the grounds and interior of Central High School were patrolled first by regular army troops and later by federalized national guardsmen.

The petition for a stay with which we are concerned was originally filed by the Board on February 20, 1958; that pleading, reduced to essentials, alleged that federalized national guardsmen were on duty at the school and were preventing interference with the attendance of the Negro students, that a small group of students with the encouragement of certain adults had created almost daily incidents making it difficult for pupils to learn and teachers to teach, that there existed unrest among students, parents and teachers which likewise made it difficult for the school district to maintain a satisfactory educational program, and that educational standards were being impaired. The prayer of the original petition was that "the plan of integration heretofore ordered by this Court be realistically reconsidered in the light of existing conditions and that in the interest of all pupils the beginning date of integration be postponed until such time as the concept of 'all deliberate speed' can be clearly defined and effective legal procedures can be obtained which will enable the District to integrate without impairment of the quality of education it is capable of providing under normal conditions." On February 25, 1958, the plaintiffs filed a motion to dismiss the petition on the ground that it stated no claim upon which relief could be granted, and on the further ground that it stated no claim for relief from a judgment or order cognizable under Rule 60(b) of the Federal Rules of Civil Procedure.

Although this case had never been on our docket, due to the fact that at the time there was no other judge regularly commissioned in the Eastern District of Arkansas, and in view of the public interest involved in the Board's petition, the Honorable Archibald K. Gardner, Chief Judge of the Court of Appeals for this Circuit, on April 18,

1958, designated us to hear and determine the issues presented by the petition, "and to do such work as may be necessary and incidental to acting upon said petition." This special assignment was made to run from April 21, 1958, to September 1, 1958, both dates inclusive.

On April 28, 1958, we held a preliminary proceeding in this matter, in the course of which we read a prepared statement, which, among other things, directed that the original petition be amended so as to disclose whether the Board desired time to reconsider the plan, or whether it simply wanted a "moratorium" or a "cooling off period," and also so as to give a reasonable indication of how long a postponement the Board felt that it needed at this time.

Subsequently, the Board filed a substituted petition containing allegations more or less similar to those of its original pleading, and praying that a stay be granted until January, 1961. In that connection, it was alleged: "Petitioners cannot with certainty determine how long operations under the plan should be postponed, but in the light of existing conditions hereinabove mentioned and in the light of conditions as they will probably exist in the foreseeable future, they are of the opinion that a suspension of operations under the plan until January, 1961 is reasonable and advisable."

The plaintiffs filed a response to the substituted petition wherein they renewed their motion to dismiss, on which motion ruling had been reserved at the preliminary proceeding above referred to, and in which they denied that the Board is entitled to the relief sought. In addition, on behalf of the Negro students admitted to the school in September, 1957, it was alleged that their rights to finish their high school education in Central High School have become vested, and that "defendants are without right at law or equity to frustrate said vested rights in this or any other proceeding."

When this matter was called for trial on the morning of June 3, the Board, without objection on the part of the plaintiffs, filed an amendment to the substituted petition alleging more definitely the respects in which it contends that the educational program at Central High School has been impaired due to the alleged situation at Little Rock. It is said in the amendment that the educational program has suffered and will continue to suffer; that the Board has had to divert funds in an attempt to solve the problems with which it has been faced, which funds would otherwise have been used for normal educational purposes such as teachers' salaries, plant maintenance and new contruction; that under the conditions that existed at Central High School during the school year just past, and under the conditions likely to exist in the foreseeable future, both the Negro and the white students have suffered and will continue to suffer unless the requested delay is granted; and that the problems caused by operation under the court orders that have been mentioned have taken and will continue to take "an undue amount of time, talent and energy of school personnel, all of which has been and will continue to be a severe strain on said personnel, and which has prevented and will continue to prevent said personnel from performing many of their regular duties."

While the plaintiffs have not filed any formal pleading directed

at the amendment to the substituted petition, we shall treat the amendment as traversed, and will also consider that the plaintiffs' motion to dismiss extends to the same, as well as to the other pleadings filed by the Board.

It is the theory of the Board, reflected in its pleadings, evidence and briefs, that the plan of integration which it adopted in 1955, upon the assumption that it would be acceptable and workable, has broken down under the pressure of public opposition, which opposition has manifested itself in a number of ways hereinafter mentioned, and that as a result the educational program at Central High School has been seriously impaired, that there will be no change in conditions between now and the time that school opens again in September, 1958, and that if the prayer for relief is not granted the situation with which the Board will be confronted in September will be as bad as, if not worse than the one under which it has labored during the past school year, and that it is in the public interest that the requested delay be granted.

While the plaintiffs deny, at least formally, that the educational standards at Central High School have been impaired, it seems to us that their fundamental position is, that even if it be assumed that everything that the Board alleges is true from a factual standpoint, nevertheless the Board's difficulties stem entirely from popular disagreement with the principle of integration, which disagreement does not form a proper legal basis for permitting the Board to postpone the operation of its plan. This contention is summarized in the plaintiffs' pre-trial brief in the following language: "The defendants' case for suspension of the injunction is predicated upon problems allegedly created by community oppositions to continued nonsegregation at Central High School. Such an approach is without legal foundation."

In addition, the plaintiffs contend that the Board does not actually stand in need of any relief. As touching the situation inside the school, they urge that the Board could have solved its problems during the year just past had it taken a firmer disciplinary stand, and that if such a stand is taken this fall the problems can still be solved; and they contend still further that if a stay should be granted it will be more difficult to put the plan back into effect in 1961 than it would be for the Board to persevere with it this coming year. With regard to the situation outside the school, the plaintiffs argue that the Board's proper remedy is the commencement of criminal proceedings or the seeking of injunctive relief against the persons responsible for the disorders.

Those conflicting theories present two basic questions for our decision, namely, whether or not this Court, sitting as a court of equity, has the power to grant the relief sought, and, if so, whether or not the Board has made a showing sufficient to justify the granting of that relief. In that connection we might call attention to the fact that in the prepared statement that we read at the preliminary proceeding held on April 28 we took occasion to say, among other things: "...let me make it clear that if the Board makes a case for

relief under the law and the evidence, then appropriate relief will be granted. But, on the other hand, if the Board fails to make a case, either from a legal or a factual standpoint, its petition will have to be denied."

As to the first question, there can be no doubt that this Court has "jurisdiction," in the sense of "power to act," to grant the relief sought. Such power is to be found in Rule 60(b) (5) and (6) authorizing a federal court to grant relief from a judgment when it is no longer equitable for the same to have prospective application, or for "any other reason justifying relief from the operation of the judgment"; and in their response to the substituted petition the plaintiffs admit: "...that Rule 60 (b)(5) and (6) empowers the Court to grant, upon such terms as are just, relief from a judgment or order."

Aside from Rule 60(b), jurisdiction to grant relief here may be predicated upon the inherent power of a court of equity with respect to its injunctive decrees. United States v. Swift & Co., 286 U.S. 106, 114-115; Tobin v. Little Rock Packing Co., DC, Ark. 104 F. Supp. 527, aff'd., 8 Cir., 202 F2d 234, cert. den. 346 U.S. 832. And, more cogently, the existence of such jurisdiction in a case of this kind appears to have been specifically recognized in the second Brown opinion wherein it was said:

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date..." Brown v. Board of Education, supra, 349 U.S. at 300, emphasis supplied.

To hold that once a plan of integration has been approved and ordered into effect by a federal court, all of the details of that plan, including the commencing date and the rate of progress toward

complete elimination of compulsory segregation, become immutably fixed would negate the concept of equity's "practical flexibility" in shaping its remedies, and would be an unwarranted limitation upon its "facility for adjusting and reconciling public and private needs." And it should be noted in this connection that although in the Arlington County, Virginia case the district judge ordered the Board there involved to commence integration by a certain time and to complete it by a certain time, he expressly reserved the power "to enlarge, reduce, or otherwise modify the provisions of said injunction or of this decree." Thompson et al v. County School Board of Arlington County, Va., DC, Va., 144 F. Supp. 239, 241, aff'd., 4 Cir., 240 F2d 59, cert. den., 353 U.S. 910.

As we approach the second question in this case, it should first be said that it cannot be seriously contended that the Board did not make a "prompt and reasonable start" toward a transition from a racially segregated to a racially integrated public school system. As stated, the Board announced its intention to move in that direction a very few days after the first Brown decision, and it actually announced its plan some days before the second and implementing decision in that litigation; and, in spite of the difficulties that have been outlined, it put the plan into operation and maintained it during the past school year. Hence the real problem is whether or not the Board now needs more time to make the transition "in an effective manner," and whether or not the granting of such time "is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date."

At the hearing on the petition, which extended from June 3 into the afternoon of June 5, the Board called to the stand its president, Mr. Wayne Upton, its Superintendent of Schools, Mr. Virgil T. Blossom, certain members of the administrative staff of the high school, and certain class-room teachers. While the attorneys for the plaintiffs diligently cross-examined the main witnesses called by the Board, they did not put on any proof of their own tending to contradict the factual aspects of the testimony of the Board's witnesses, but confined their evidence to the testimony of two expert witnesses, namely, Dr. Virgil M. Rogers, Dean of the School of Education of Syracuse University, Syracuse, New York, and Dr. David G. Salten, Superintendent of Schools at Long Beach, Long Island, New York. Those witnesses gave it as their opinion in general that to grant the petition would be unnecessary and undesirable, and that the Board should keep its plan in operation while using stricter disciplinary procedures against those in the school who might become involved in racial incidents such as were described by the Board's witnesses; and they also were of the opinion that stricter procedures should have been used during the past school session.

From the practically undisputed testimony of the Board's witnesses we find that although the continued attendance of the Negro students at Central High School was achieved throughout the 1957-58 school year by the physical presence of federal troops, including federalized national guardsmen, nevertheless on account of popular opposition to integration the year was marked by repeated incidents of more or less serious violence directed against the Negro students

and their property, by numerous bomb threats directed at the school, by a number of nuisance fires started inside the school, by desecration of school property, and by the circulation of cards, leaflets and circulars designed to intensify opposition to integration. Mr. J. O. Powell, the vice-principal for boys at the high school, summed the situation up by saying that the first year of operation under the plan was one of "chaos, bedlam and turmoil" from the beginning.

The incidents and other matters just referred to, plus the presence of the troops, which was in and of itself a distracting influence, created throughout the year a situation of tension and unrest among the school administrators, the class-room teachers, the pupils, and the latters' parents, which inevitably had an adverse effect upon the educational program; and we find that said program was seriously impaired, that the orderly administration of the school was practically disrupted, and that educational standards have suffered. We further find that unless a stay is granted, the same situation will prevail when school opens in September, and that the impairment of the educational program and standards will continue and will probably grow worse.

Before discussing further the adverse effect of the events that transpired during the past school year, we desire to point out that the Board and the school administration had no authority over individuals or groups outside the school, and while they undertook to handle and control the situation within the school by the employment of normal disciplinary procedures, they were unable to do so because of the nature and source of the opposition to integration both inside and outside the school.

It is important to realize, as is shown by the evidence, that the racial incidents and vandalism which occurred in Central High School during the past year did not stem from mere lawlessness on the part of the white students in the school, or on the part of the people of Little Rock outside the school; nor did they stem from any malevolent desire on the part of the students or others concerned to bomb the school, or to burn it down, or to injure or persecute as individuals the nine Negro students in the school. Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years. The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock, that the Brown decisions do not truly represent the law, and that by virtue of the 1956-57 enactments, heretofore outlined, integration in the public schools can be lawfully avoided.

In this connection, the president of the Board, Mr. Upton, testified that between the spring and fall of 1957 there was a marked change in public attitude towards the plan, that persons who had formerly been willing to accept it had changed their minds and had come to the conclusion "that the local School Board had not done all it could do to prevent integration, and that we didn't have to have integration"; and Vice-principal Powell testified that he believed

that the white children involved in the incidents "feel that they are morally correct in their attitude and in their opposition," and that such is due to the "cultural patterns and sociological patterns in this community for many years," and that the students who created the incidents felt that it was wrong to integrate the Negro children into Central High School.

With respect to the effects of the 1956 constitutional amendment and initiated acts and of the 1957 statutes, Mr. Blossom testified that those enactments had their effect at Little Rock and throughout the State in stiffening opposition to the plan and in persuading people that there was no necessity for integration at this time.

Mr. Blossom further testified that the opposition to integration and the feeling that it was not required at this time had been greatly strengthened by numerous newspaper articles and advertisements, and by circulars and cards distributed in Little Rock, copies of which were introduced in evidence. Without prolonging this opinion by undertaking to abstract or quote from individual exhibits, we may say that we agree with Mr. Blossom's appraisal of their effect. Those exhibits in general, condemn the principle of integration; some of them condemn the Board and the Superintendent for alleged precipitateness in adopting the plan, and for their alleged mistreatment of white students during the past year; and many of them emphasize the idea that integration can be avoided by legal constitutional means.

Regardless of the merits of the sociological and legal views expressed in those exhibits, the conclusion is inescapable that they are shared, in whole or in part, by a majority of the population of Little Rock, representing a cross section of the people of that city. On that point, Mr. Upton was asked in the course of his examination whether or not the people who had raised with him the questions which we have previously mentioned were fairly intelligent people, and he replied that they were, and that they were generally people who recognized him and who knew him. And Mr. Blossom expressed the opinion that the doubts and questions in the minds of many people were honest ones, and that it was his opinion that the great majority of the people of the community, from the contacts he had had with it, do not favor integration.

With further reference to the 1956-57 enactments it should be said that at least some of them are now involved in litigation pending in the state courts and after that litigation is decided by the trial courts, appeals will doubtless be taken to the Supreme Court of Arkansas, which alone can finally and authoritatively construe the same, and can, in the first instance, pass upon their validity; after the Supreme Court of Arkansas has ruled, these matters may well be carried to the Supreme Court of the United States for final review, all of which will take time. On that subject Mr. Blossom testified: "If you take the suits that are now pending and recognize the ones that are now being proposed, and none of them have been cleared out, the opinion that I would have would be that there are many, many months ahead before there will be any decision on them,

to where there is a clear-cut situation between state and federal law on this problem, and that, in itself, creates this dilemma. You don't know where you are."

Getting back to the effects of the events of the past school year on the educational program at Central High School, we find more specifically that those events have had a serious and adverse impact upon the students themselves, upon the class-room teachers, upon the administrative personnel of the school, and upon the over-all school program. In addition, said events have cast a serious financial burden upon the school district, which it has had to meet at the expense of normal educational and maintenance functions.

As far as the students themselves are concerned, we think it obvious that the incidents and conditions that have been described could not have been good for them emotionally; but aside from that, their education has certainly suffered and under existing conditions will continue to suffer, as is shown by the testimony of the classroom teachers called by the Board.

For example, Mr. W. P. Ivey, who has taught mathematics in the Little Rock school district for 34 years and who has been on the faculty of Central High School every since that school was opened in 1927, testified that the presence of the Negro students created a tension on the part of both students and teachers that was noticeable every day, and that this tension impaired his ability to teach and the receptivity of his students. On cross-examination he stated that the final results obtained by him in his classes were not as good as they had been in prior years, as evidenced by his tests and also by comparison of the grades made in his classes which included Negro students with the grades made in his classes not attended by any of the Negroes.

Another member of the faculty who described the adverse effect that the presence of the Negro students, and all that went with it, had on educational standards was Mrs. Govie Griffin, who has taught chemistry for 13 terms at Central. The subject that she teaches is an elective course, taken principally by those who plan to go to college and who presumably are interested in mastering the subject. It was her observation that the presence of the troops in the school, their standing outside of class-room doors during recitations, and their actions in walking up and down the halls, occasionally dropping their clubs, all had a disturbing effect on pupils and teachers alike. Due to that situation and the prevailing tension and unrest, the amount of subject matter that she was able to offer in her chemistry course was so seriously curtailed that she had to request that standard achievement tests usually given at the close of the school year be not given; and her request was granted. She said in this regard: "In the past we have always given standardized tests at the close of the school year, and the pupils have always been far above the national norm. This year I requested they not be given the test in all fairness to the students because we had not covered the material we had in the past years."

As to the effect of the events of the past session on the class-room teachers and administrative staff personally, the observations and experiences of Mrs. Elizabeth Huckaby, vice-principal for girls, who has been at Central since 1930, an informative. She stated that normally in addition to her administrative duties she taught two English classes, but that during the past year she has been compelled to give up those classes and to devote all of her time to administrative duties, and that from 75 to 90 percent of her time was devoted to problems created by integration. These problems, and the unrest and tension in the school had an adverse effect upon her nerves and physical well being. She testified that apprehension over existing conditions caused her to lose sleep, which problem she had never had before; that she had no social life because of her exhaustion at the end of each day, and that on week ends she and her husband would go to the country and relax, and that by noon on Sunday she "would begin to revive enough to face the next week." Mrs. Huckaby also observed that other teachers were likewise suffering ill effects; she stated that some would come to her trembling, and that others would come weeping because of the events that were transpiring, and she pointed out in this connection that teachers in the main are not accustomed to violence.

Mrs. Huckaby's testimony as to the effect of the integration problems on the class-room teachers was corroborated by that of Mrs. Margaret Ryman, a mathematics teacher, and of Mrs. Shirley Stancil, a guidance counsellor, and likewise by the testimony of Mr. Blossom. The latter stated that one of his greatest concerns during the year was the health and welfare of the teachers, and that he felt very strongly that the teachers were under more strain than the students since they had upon their shoulders the responsibility for the physical welfare and educational progress of every student in the school, and that "they took that responsibility to heart and it affected many of them and that was reflected in many of the conferences I had with them as individuals."

The tension and strain to which the administrative staff were subjected did not terminate with the close of the school day. Mr. Powell stated that on a typically difficult day his phone would commence ringing as soon as he got home from school, the calls coming from people desiring various types of information; that he has spent as much as three hours on certain days "answering the telephone, or in making calls or dodging calls;" that he has had to work long hours during the evenings and nights on many occasions, and that his social life and normal rest had been interfered with to a definite extent during the entire school year.

Along the same lines Mr. O. W. Romine, Director of School Plant Services for the entire school district, testified that under normal conditions he worked from eight in the morning until five in the afternoon, and that after hours' duty was rare. During the past year, however, he had been on call 24 hours a day, and had received hundreds of calls at all hours of the night; on many occasions when his telephone had rung, and he had picked up the receiver, he found no one

on the line. At one stage of the troubles he was away from home so much at night that he did not see his youngest child for four days, since he would get in at night after the child had gone to bed and would be gone in the morning before the child awoke.

The subject matter of some of the exhibits introduced by the Board consisted, in part at least, of personal attacks on the Board members and the administrative staff, which could not have failed to have reacted unfavorably upon them personally. In addition, Mr. Blossom was the recipient of many threats against his physical safety and well being. Of the Board members, Mr. Upton, at least, was subjected to much personal harassment, mainly by telephone calls, and to such an extent that he had to take an unlisted number.

It is too clear to require discussion that the experiences of the classroom teachers and of the administrative staff must have produced at least some loss of personal efficiency on their part, with corresponding damage to the educational program. More serious, however, is the fact that it has been necessary to divert the time and talents of the trained administrative personnel from their normal duties in dealing with the many complex problems involved in the operation of a high school like Central to purely disciplinary matters; and we find, as alleged by the Board, that the efforts of the administrative staff to cope with the integration problems with which they have been confronted have consumed and undue amount of their time and energy; and we agree with Mr. Blossom in his statement that the diversion of administrative skills and energies to discipline maintenance during the past year may have been one of the highest prices that the school district has had to pay. At least one serious result of such diversion is that the curriculum planning which had been previously emphasized at Central, has been seriously impeded. In addition, the building program has been held up although the District's enrollment is rapidly increasing, with an accompanying need for more facilities.

As stated, the evidence further showed that the school district has had to shoulder substantial financial burdens on account of integration, and that this has been at the expense of other school programs. Mr. Romine testified, for example, that it was necessary to employ five additional night watchmen at the high school and that the cost for this item alone was between nine and ten thousand dollars; further, when it became necessary to relieve Mr. Powell and Mrs. Huckaby of their teaching duties so that they could devote their energies to the administrative problems with which the school was confronted, substitutes had to be hired to take their places in the classrooms. Moreover, the Board had to spend money to repair the damages to the school property, and to replace locks which had to be cut off of lockers during bomb searches; on that point Mr. Romine said that at one time he saw a bushel basket full of cut locks, and that it cost the Board $1.25 apiece to replace them. Mr. Romine further testified that the overall maintenance budget for all the schools in the district for the fiscal year ending June 30 of the current year was $123,000, that by January of this year he saw that

unless something was done that budget would be overrun by approximately $17,000. In order to stay within the budget it was necessary he said to dismiss the paint crew of five men, thus saving not only their wages but also the cost of the paint they would have used, and to forego some normal maintenance work on the school properties.

Mr. Blossom testified that the funds of the Little Rock School District are not unlimited, that in fact the district is underfinanced, and the annual expenditure per child is approximately $100 below the national average. He further pointed out that whenever district funds have to be diverted to meet unusual problems as they were during the past year, the district suffers harm, and that such diversions may mean that less teachers can be employed, and less instructional equipment purchased.

Looking toward the approaching school term it was the consensus of opinion on the part of the Board's witnesses, and we find, that there has been no softening of the public attitude in Little Rock toward integration, and we further find, as heretofore stated, that unless some relief is granted the Board the conditions that will prevail in Central High School during the 1958-59 school year will be as bad as they were during 1957-58, and will probably deteriorate still further. One reason for this conclusion is that, according to the evidence, Central High School operated last year largely on a momentum that had been built up during past years, and that momentum is running down. Any efficient organization, manned by skilled personnel, as was Central High School in September, 1957, can operate for a time on its momentum even in the face of severe pressure; but with such pressure a time comes when that momentum is lost, and when that happens then, unless the pressure is removed, the organization breaks down. We are convinced that such point is being approached at Central. Mr. Blossom stated in that connection that the strain of the past year had already taken its toll, and would be felt still further when school opens this fall, and that starting into another year would be entirely different from the commencing of school last September. In this he was corroborated by Mrs. Huckaby.

We further find that if the attendance of Negro students at Central High School is to be maintained during the next school year, the Board will have to have military assistance or its equivalent, and it is financially unable to bear the expense of hiring a sufficient number of guards to control the situation. It cannot be expected that the Little Rock Police Department will be in a position to detail enough men to afford the necessary protection.

As to the need for troops when school re-convenes, Superintendent Blossom stated that he saw nothing to indicate that conditions at the school would be different in September than they were throughout the past year, and that as a school administrator he saw no lessening of responsibility for the safety of everyone concerned; he said, "We have that responsibility just as greatly today as we did yesterday, and we will have it tomorrow." And when asked whether or not it would be necessary to have the same guards and civilian security

employees in the school in September, he replied: "As I said before, I have no reason to anticipate anything different from what we had. If we take what history teaches us, I think that will be a natural conclusion."

Now, while troops can disperse crowds, and can keep the Negro students physically within the school, and while it is possible that if troops were deployed in sufficient numbers all over the school vandalism could be checked, the presence of troops cannot reduce or eliminate racial tensions, or create a climate that is conducive to education; on the contrary, the presence of armed soldiers in a school is, as has been shown here, disrupting to the educational process. As to the importance of a proper educational climate, Mr. Blossom said: "...any educational program needs to have certain things present in the atmosphere, such as a climate where children can be taught and teachers can teach. We have contended that that condition has not existed at Central High School, that it is not likely to exist next year. Now, in putting on any educational program, the proper conditions are about as necessary as the proper tools and the proper teachers." Furthermore, when Mrs. Huckaby was asked on cross-examination if she did not think that the Board, the school administration, the city authorities, and the military could carefully plan the running of the high school, she replied that she did not relish the idea of having those particular groups always involved in her educational system, because as an educator such was foreign to her experience.

As has been said, there can be no question that the Board made a prompt and reasonable start toward compliance with the principles laid down in the Brown cases; thereafter, it put its plan into operation and has adhered to it in good faith in the face of great difficulties. Now, it has come here seeking relief only after it has been confronted with what is, from an educational standpoint, an intolerable situation, and it does not ask for an abandonment of its plan nor does it attempt to obtain an indefinite postponement. It is simply requesting a tactical delay. We are convinced that in seeking this delay the Board is still acting in good faith, and, upon the showing that hs been made, we are satisfied that the Board needs more time to carry out its plan in an "effective manner," and that to grant the instant petition is in the public interest, and is consistent with good faith compliance, at the earliest practicable date, with the principles above mentioned. In reaching this conclusion we are not unmindful of the admonition of the Supreme Court that the vitality of those principles "cannot be allowed to yield simply because of disagreement with them;" here, however, as pointed out by the Board in its final brief, the opposition to integration in Little Rock is more than a mere mental attitude; it has manifested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted.

We have seen that the Supreme Court said in the second Brown decision that the transition of a formerly segregated school to a school free from compulsory segregation should be carried out in an "effective manner," and that such a transition is in the public interest.

In our estimation a transition which impairs or disrupts educational programs and standards, and which will continue to do so, is not in the public interest, but, on the other hand, inflicts irreparable harm upon all of the students concerned, regardless of race. Where, as here, such a transition is being undertaken under the compulsive effects of a federal court order, a refusal to modify such order so as to ameliorate the situation would in our opinion under the circumstances here present be inequitable, if not arbitrary as well.

That the Supreme Court recognized the necessity of maintaining educational standards is evidenced by the following language in the first Brown decision.

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities; even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education..." (Brown v. Board of Education, supra, 347 U.S. at 493).

And Judge Miller, in his original opinion in this case, pointed out that the Board was undertaking not only to work out a program of integration, but also to preserve and improve educational standards; and he took occasion to say: "(The Board) must consider the personal rights of all qualified persons to be admitted to the free public schools as soon as practicable on a nondiscriminatory basis. The public interest must be considered along with all the facts and conditions prevalent in the school district. Educational standards must not be lowered..." (Aaron v. Cooper, supra, 143 F. Supp. at 864-865.) Furthermore, the Court of Appeals in its affirming opinion said: "...The schools of Little Rock have been on a completely segregated basis since their creation in 1870. That fact, plus local problems as to facilities, teacher personnel, the creation of teachable groups, the establishment of the proper curriculum in desegregated schools and at the same time the maintenance of standards of quality in an educational program may make the situation at Little Rock, Arkansas, a problem that is entirely different from that in many other places." Aaron v. Cooper, supra, 243 F2d at 364.

The importance of maintaining educational standards today is certainly no less than it has been in prior years; in fact it is more urgent. And while the Negro students at Little Rock have a personal interest in being admitted to the public schools on a nondiscriminatory basis as soon as practicable, that interest is only one factor of the equation, and must be balanced against the public interest, including the interest of all students and potential students in the district, in having a smoothly functioning educational system capable

of furnishing the type of education that is necessary not only for successful living but also for the very survival of our nation and its institutions. There is also another public interest involved, namely, that of eliminating, or at least ameliorating, the unfortunate racial strife and tension which existed in Little Rock during the past year and still exists there.

When the interests involved here are balanced, it is our opinion, in view of the situation that has prevailed and will in the foreseeable future continue to prevail at Central High School under existing conditions, the personal and immediate interests of the Negro students affected, must yield temporarily to the larger interests of both races.

While we do not seek at this time to authoritatively define the term "all deliberate speed" employed by the Supreme Court in the Brown case, it does seem to us that the term is a relative one, dependent upon varying facts and circumstances in different localities and that what might be "deliberate speed" under one set of circumstances could constitute headlong haste under another. And it further appears to us that said term involves the idea of a progress toward the elimination of compulsory segregation that is consistent with the maintenance of sound educational standards and a salutary educational atmosphere, neither of which can be maintained at Central High School if the Board is compelled to keep its plan in operation at this time. After all, the function of any public school system, whether integrated or not, is to educate people.

It is important to realize that to grant the stay requested by the Board will not deprive any Negro student of a good high school education. In 1957 the completely new and up-to-date Horace Mann High School for Negroes was put into operation, and in that school, apart from any question of integration, the Negro students can receive an education equal to that provided in Central High School. As to the Horace Mann School, Mr. Blossom testified that, relatively speaking, the quality of education in that school, measured by any desired indicia, whether facilities, teacher preparation, teaching aids, or instructional supplies, is "on a par with any other school." He further stated with reference to the past session: "The truth of the business is it was better than most high schools in this State, white or colored." He also testified that he felt that the Negro students could in 1958 "be better educated in another manner without them being hurt."

The granting of the Board's petition does not, in our estimation, constitute a yielding to unlawful force or violence, but is simply an exercise of our equitable discretion and good judgment so as to allow a breathing spell in Little Rock, while at the same time preserving educational standards at Central High School.

At one point in his testimony Mr. Blossom stated, and we agree with him, that a tactical delay is not the same as a surrender; and the delay here sought is not a vain thing or a mere frustration of the plaintiffs' rights. In the first place, the delay, in and of

itself may well be of material value to the Board in carrying out its announced purposes. In the two and one-half year period involved tempers will have a chance to cool down, emotions may subside to some extent, and there may also be changes in some of the personalities involved in the dispute. Of more significance, however, is the fact that the delay will afford time for the completion of the pending litigation in the state courts and for an appraisal of the results of that litigation. Obviously, should the state legislation challenged in that litigation be upheld as valid, such a result might well have a profound effect on the situation at Little Rock. On the other hand, should that legislation be held unconstitutional, and particularly if such a result should be reached by the state courts, the people of Little Rock might be much more willing to acquiesce in integration as contemplated by the plan.

What has just been said likewise indicates that the length of the proposed stay is reasonable, and we so find. On this point we agree with the opinion expressed by Mr. Upton, who is an experienced lawyer, that it will take at least two years for the litigation above referred to to be finally terminated. In addition to that, considering the nature of the problem, two and one-half years is not a very long period of time; and a very short delay would serve no useful purpose. Added to those considerations is the fact that the Board and the Superintendent, who are familiar with the problem and whose responsibility it was in the first instance to decide how long a stay was desired, after considering the various factors involved determined on a two and one-half year period, and deemed it desirable to resume the plan at mid-term of the 1960-61 school year. And we do not believe that under the circumstances the Court should disturb their judgment, even if it were inclined to do so.

In their brief in support of their motion to dismiss the original petition the plaintiffs cited a number of cases[3] standing for the proposition that an injunction may not be dissolved or modified in the absence of a showing of unforeseeable changes in conditions which

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3. Klapprott v. United States, 335 U.S. 601; Ackermann v. United States, 340 U.S. 193; United States v. Swift & Co., supra, 286 U.S. 106; Walling v. Harnischfeger Corporation, DC, Wis., 142 F. Supp. 202, aff'd., 7 Cir., 242 F2d 712; John E. Smith's Sons Co. v. Lattimer Foundry & Machine Co., 3 Cir., 239 F2d 815; Federal Deposit Ins. Corp. v. Alker, 3 Cir., 234 F2d 113; Smith v. Kincaid, 5 Cir., 232 F2d 306; Morse-Starrett Products Corp. v. Steccone, 9 Cir., 205 F2d 244; Elgin National Watch Co. v. Barrett, 5 Cir., 213 F2d 776; Bigelow v. Twentieth Century-Fox Film Corp., 7 Cir., 183 F2d 60; Coca Cola Bottling Co. v. Standard Bottling Co., 10 Cir., 138 F2d 788; United States v. Besser Manufacturing Co., DC, Mich. 125 F. Supp. 710; Sunbeam Corporation v. Charles Appliances, DC, N.Y., 119 F. Supp. 492.

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have created an exceptional situation. While none of those cases involved any problem of race relations or school integration, we do not quarrel with the general rule laid down therein, and the Board in its brief in opposition to the motion concedes "that the situation must be 'extraordinary' and that the circumstances must be 'exceptional.'"

Here, however, there has been a very radical change of situation since the former orders of this Court were entered, the occurrence and extent of which were not, to our mind, foreseeable at that time. And the situation with which the Board is now confronted is certainly exceptional and extraordinary if not, indeed, unique, that situation being complicated by the vast amount of publicity that has been given to it.

It must be remembered that when Judge Miller handed down his decision in 1956, the people of Arkansas and the legislature had not adopted the measures that we have mentioned; on the contrary, the 1955 legislature had refused to enact certain similar legislation. And when Judge Davies on September 3, 1957 ordered the Board to put its plan into effect forthwith, and when he denied the Board's application for a stay on September 7, and when he entered his order of September 20 enjoining the Governor from further interferring with the operation of the plan, the Negro students had not begun attending classes at the school, federal soldiers had not appeared upon the scene, repeated racial incidents had not occurred, the teachers had not been frightened and demoralized, and educational standards had not been impaired. All of this has taken place since the final order entered by Judge Davies, and we do not believe that he foresaw the result that has come about. On the contrary, in his findings of fact and conclusions of law in connection with the injunction against the Governor he took occasion to refer to the history of peaceful race relations in Little Rock, and to state that prior to the calling out of the Guard the "faculty and the white student body at Central High School were prepared to accept the 9 colored children as fellow students." Aaron v. Cooper, DC, Ark., 156 F. Supp. at 224.

As we have said, the fundamental position of the plaintiffs in opposing the petition appears to be that popular opposition to the plan, resulting in obstructions to its orderly operation, does not form any legal basis for affording the Board any relief in this case. In support of that argument counsel for the plaintiffs have cited the following cases: Allen v. County School Board of Prince Edward County, Va., 4 Cir., 249 F2d 462, cert. den. 2 L. Ed 2d 530; Orleans Parish School Board v. Bush, 5 Cir., 242 F2d 156, cert. den. 354 U.S. 921; Jackson v. Rawdon, 5 Cir., 235 F2d 93, cert. den., 352 U.S. 925; Mitchell v. Pollock, DC, Ky., 1 Race Rel. L. Rep. 1038; School Board of Charlottesville, Va. v. Allen, 4 Cir., 240 F2d 59, cert. den. 353 U.S. 910; and School Board of Newport News, Va. v. Atkins, 4 Cir., 246 F2d 325, cert. den., 355 U.S. 855.

Those cases unquestionably hold that a school board is not justified in failing to make a prompt and reasonable start toward the elimination of compulsory segregation merely because of popular

opposition to such a step. But none of them has involved a situation like the instant one where a board has made a prompt and reasonable start, and has actually put its plan into operation, only to find it breakdown in practice with a consequent impairment of educational standards and demoralization of the faculty and student body.

It is one thing to say that a school board must make a start in the direction of integration without regard to public feelings on the subject, as Judge Hutcheson said in Jackson v. Rawdon, supra; but it is quite another thing to say that when a school board has had the experiences with its plan which the Little Rock Board has had, and when, after observing the results of that plan in operation, it comes into federal court seeking not to abandon the plan or to lay it aside indefinitely, but merely a moratorium, the court must close its eyes and ears to the practical problem with which such board is confronted. Such a judicial attitude would be most unrealistic.

If popular feelings and attitudes are utterly and at all times irrelevant to the question under consideration, the Court of Appeals in affirming Judge Miller in this case would hardly have stopped to point out that the Little Rock schools had been segregated for over 80 years; nor would there have been any occasion for the Court of Appeals to say in the New Orleans case that once a school board has accepted the principle laid down in the Brown decisions, it may well be entitled to "time for such reasonable steps in the process of desegregation as appears to be helpful in avoiding unseemly confusion and turmoil." Orleans Parish School Board v. Bush, supra., 5 Cir., 242 F2d at 166.

Plaintiffs have also cited Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579; Ex parte Endo, 323 U.S. 283; Morgan v. Virginia, 328 U. S. 373; and City of Birmingham v. Monk, 5 Cir., 185 F2d 859, cert. den., 341 U.S. 940. Those cases hold that ordinarily enforcement of individual constitutional rights will not be delayed because of the public interests opposed to them, and that the State cannot deprive one of a constitutional right through the exercise of the police power. None of those cases, however, was a school integration case, and, as has been pointed out, the second Brown decision itself recognizes the propriety of delay in school integration under proper circumstances.

In the instant case it is not denied that under the Brown decisions the Negro students in the Little Rock District have a constitutional right not to be excluded from any of the public schools on account of race; but the Board had convincingly shown that the time for the enjoyment of that right has not yet come. That showing applies to the Negro students who were in the school last year as well as to others. While the plaintiffs contend that the rights of the students last mentioned have become vested, no authority in support of that proposition has been cited to us, and we know of no such authority, and we do not believe that such contention can be sustained.

In support of their argument that if the Board had used sufficiently firm disciplinary measures it could have controlled the situation within the school, and that by such measures it can

re-establish control this coming year, the plaintiffs called to the stand the two New York educators heretofore mentioned, and their opinion evidence was in line with the plaintiffs' contentions. On the other hand, the testimony of Mr. Blossom and of Mr. Upton, was to the effect that the Board had diligently sought to preserve discipline, that it had expelled a few students and had suspended others for various periods of time, that it had undertaken to consider each case on its own merits and the effect of the action to be taken not only upon the individual child concerned but also upon the other students in the school. It was the opinion of those witnesses that in view of the unusual situation with which they were confronted and of the source and nature of the opposition with which they were faced conditions would have been made worse rather than better by the employment of harsh disciplinary measures such as mass expulsions, and that the course that had been in fact pursued was the best possible one under the existing circumstances.

While Dr. Rogers and Dr. Salten are doubtless well qualified to express opinions as to how school matters should be handled in areas of the country with which they are familiar and in which they have had experience, neither of those gentlemen has had any public school administrative experience in the South, or any personal familiarity with the Little Rock situation; nor has either of them ever had any experience with the problems involved in the transition from segregation to integration in a state where the former has been the accepted and traditional mode of life of the people and where its existence in the public schools has had the sanction of law for so long as those schools have existed. As regards Dr. Rogers in particular, his qualifications to speak on this subject were seriously impaired, in our eyes, by his suggestion that members of the student body at Central High School might have been used, in effect, as spies upon other students there. In view of these limitations upon the qualifications of the plaintiffs' witnesses, we cannot accept their opinions in preference to that of Mr. Blossom, who is also an expert, and who formed his opinion on the ground and has based it upon his own intimate experience with the problem.

It is true that the views of Vice-principal Powell coincide with the opinions of the plaintiffs' experts, as far as the situation inside the school is concerned; but it must be remembered that Mr. Powell had no ultimate disciplinary authority and no responsibility for any matters of overall policy; he was a subordinate employee, and it was not shown what qualifications, if any, he possesses as an expert in public school administration. He testified that he graduated from Central High School in 1940, that he was employed at the school in an undisclosed capacity in 1952, and that he has been vice-principal for boys for the past three years. His training and experience between 1940 and 1952 were not brought out in the evidence. It is also interesting to note in this connection that Mr. Powell's counterpart, Mrs. Huckaby, did not feel that the employment of stern disciplinary measures was the key to the problem. Actually, it occurs to us that Mr. Powell may well have been so close to the situation in all of its personally unpleasant aspects, that he has to some degree lost his

sense of perspective in the matter.

In addition to all of the foregoing, it is well to keep in mind that the duty of maintaining discipline in the schools and of deciding what disciplinary steps should be taken is primarily the function of the school administration, and not that of the Court; and we would certainly be unwilling to substitute our judgment as to what should have been done for that of the Board in the absence of a showing that the Board had erred to such an extent as to indicate an absence of good faith on its part. There has been no such showing here.

Relative to interference from outside the school, the plaintiffs urge that the Board should have either instituted criminal prosecutions against the persons responsible, or that it should have applied for injunctive relief, as was done in the Hoxie, Arkansas, and Clinton Tennessee, cases. See Hoxie School District No. 46 of Lawrence County v. Brewer, DC, Ark., 137 F. Supp. 364, aff'd., 8 Cir., 238 F2d 91; and Kasper v. Brittain, 6 Cir., 245 F2d 92, cert. den., 2 L. Ed2d 46. In answer to that argument Mr. Blossom testified, and he was corroborated by Mr. Upton, that the Board had determined as a matter of judgment not to resort to criminal prosecutions or to seek injunctive relief; that it was not the function of the Board to prosecute people or to seek injunctions but to run a school system, and that it had already had all of the litigation that it wanted and was not anxious for any more.

We think that the Board acted within its competency in coming to that conclusion, and we do not hink that its failure to commence criminal actions or to seek injunctive relief should militate against its present petition. In the first place, the Board is not charged with the duty of commencing criminal prosecutions or of enforcing the criminal laws of the State. Secondly, by reason of the nature, source and extent of the opposition to integration in Little Rock, actions by the Board looking toward criminal prosecutions or injunctions might have aggravated rather than eased the situation. Moreover, the Board might have had a good deal of difficulty in identifying the persons causing the trouble or in establishing that their conduct constituted crimes or was of such quality as would justify the granting of injunctive relief.

As far as the Hoxie and Clinton cases are concerned, Mr. Blossom testified, and we agree, that the situation at neither of those places was comparable to the situation that has existed and now exists in Little Rock. Both Hoxie and Clinton are much smaller places than Little Rock; hence the procedures followed in the former places might not be effective in the latter.

As an illustration of the differences in situation just mentioned, attention is called to the fact that Judge Reeves' opinion in the Hoxie case discloses that the total integrated student body at Hoxie was 1025, of which only 25 students were Negroes, whereas Judge Miller's opinion in this case shows that the percentage of Negroes

to whites in the high school grades at Little Rock, as of May, 1956, was .229, such percentage in the junior high grades was .246, and in the elementary grades .262, the overall percentage being .252. Moreover, Judge Reeves' opinion also makes clear that the educational facilities for Negroes at Hoxie were by no means comparable to those available to the white sutdents, which is not the case at Little Rock.

As to the Clinton, Tennessee case, we take judicial notice of the fact that Clinton is a small town located in the mountainous country of eastern Tennessee where there are very few Negroes. In addition, the trouble there was readily traceable to one individual from outside the State, as is shown by the evidence in this case and by the opinion of the Court of Appeals in Kasper v. Brittain, supra.

It being in the public interest, including the interest of both white and Negro students at Little Rock, that we have a peaceful interlude for the period mentioned, an order is being entered permitting the Board to suspend the operation of its said plan until mid-semester of the 1960-61 school year, without the Board, or the individual members thereof, or the Superintendent of Schools being considered in contempt of this Court; and the Court retains jurisdiction of this cause for such other and further proceedings as may hereafter become necessary or appropriate.

THIS the 20th day of June, 1958.

/s/

HARRY J. LEMLEY
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

JOHN AARON et al., Plaintiffs

vs. Civil Action No. 3113

WILLIAM G. COOPER et al., Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, and VIRGIL T. BLOSSOM, Superintendent of Schools, Defendants

ORDER

On this day the Court having considered the petition of the defendants in the above styled cause wherein they pray for a modification of the orders of this Court, entered on August 28, 1956, and September 3, 1957, respectively, so as to permit a temporary suspension of the defendants' plan for the gradual racial integration of the public schools in Little Rock, Arkansas, and being well and fully advised, and having filed herein its memorandum opinion in connection with said petition, incorporating therein its findings of fact and conclusions of law,

IT IS BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendants be, and they hereby are, granted permission to suspend the operation of said plan of integration until mid-semester of the 1960-61 school year without being considered, either collectively or individually, in contempt of this Court.

The Court retains jurisdiction of this cause for such other and further proceedings as may hereafter become necessary or appropriate.

This the 20 day of June, 1958.

/s/ Harry J. Lemley
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

JOHN AARON et al, Plaintiffs

vs

WILLIAM G. COOPER et al., Defendants

Civil Action No. 3113

ORDER DENYING STAY

The motion of the plaintiff to stay the enforcement of the judgment in this action rendered by us on June 20, 1958, pending appeal therefrom, having been given new consideration by the court, is hereby denied.

As we understand the law, we have a discretion in this matter; and we feel that that discretion should be exercised in denying the motion, primarily for the reason that from a practical standpoint to grant this motion and stay the enforcement of our judgment would to a large extent nullify our order in the case, since it will in all probability take months to carry the case through the Court of Appeals and the United States Supreme Court; and in the meantime the situation at Central High School, which we have found to be intolerable from an educational standpoint, would continue from the beginning of the approaching session to the final ruling of the Supreme Court on the merits of the case; and for the reason stated in our opinion in said cause, we do not think that such is in the public interest, including the interest of both the white and Negro students in the Little Rock district.

The Honorable Archibald K. Gardner, Chief Judge of this circuit, in assigning us to handle the school board's plea, gave us up to and including Sept. 1, 1958, within which to try and decide the case. In order that any aggrieved party might apply for appellate relief before the beginning of the next school session, our preliminary proceeding, the trial and the preparation and filing of our opinion and order were speeded up as fast as we felt such could be done and at the same time give proper consideration to the cause.

We do not feel that the plaintiffs are deprived of the opportunity of securing an appellate ruling on their motion for supersedeas by reason of the action we are now taking, since it will be more than two months before Central High School convenes this fall, and in the meantime the plaintiffs can apply at least to the Court of Appeals of this circuit for a stay of the enforcement of our judgment of this action.

This, the Twenty-third day of June, 1958.

HARRY J. LEMLEY
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 16034

John and Thelma Aaron, minors, by their mother and next friend, (Mrs.) Thelma Aaron; et al., Appellants, vs. William G. Cooper, et al., Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and Virgil T. Blossom, Superintendent of Schools, Appellees.	Appeal from the United States District Court for the Eastern District of Arkansas.

[August 18, 1958.]

Wiley A. Branton and Thurgood Marshall (Elwood H. Chisolm, Irma Robbins Feder, Constance Baker Motley, and Spottswood W. Robinson, III, of Counsel) for Appellants.

Richard C. Butler and A. F. House, for Appellees.

Before Gardner, Chief Judge, and Sanborn, Woodrough, Johnsen, Vogel, Van Oosterhout and Matthes, Circuit Judges.

Matthes, Circuit Judge.

This appeal is another in a series of legal actions which followed the adoption and implementation of a plan for gradual

integration of the public schools in Little Rock, Arkansas, as set up by the school board in that district, and approved by the United States District Court for the Eastern District of Arkansas, and by this Court. See Aaron v. Cooper (E. D. Ark. 1956) 143 F. Supp. 855, aff'd 243 F. 2d 361 (8 Cir. 1957); Thompson v. Cooper (8 Cir. 1958) 254 F. 2d 808; Faubus v. United States (8 Cir. 1958) 254 F.2d 797.

In conformity with the plan, and under the direction of the Superintendent of Schools of the Little Rock School District (hereinafter called "District"), approximately sixty Negro students were meticulously screened prior to the opening of schools in September, 1957. Seventeen were accepted for entrance in the final two years in high school, but when eight of the students voluntarily withdrew, the nine remaining attempted to enter the school when it opened. After a series of skirmishes, resulting in the placing of troops around the Central High School building, (see Faubus v. United States, supra), the nine Negro students were admitted and eight of them attended the full year. On February 20, 1958, the members of the school board (hereinafter called "Board") and the Superintendent, filed a petition in the United States District Court, Eastern District of Arkansas, Western Division, asking that the plan of integration"be realistically reconsidered in the light of existing conditions," and that it be postponed until such time as the concept of "all deliberate speed" could be clearly defined. Thereafter, the Honorable Harry J. Lemley, United States District Judge for the Eastern and Western Districts of Arkansas, was designated by the Chief Judge of this Circuit to hear and determine the issues presented by the petition. At the District Court's direction, appellees filed an amended petition in which they alleged that in light of existing conditions, they were of the opinion that a suspension of operations under the plan until January, 1961, was reasonable and advisable. Appellants attacked the petition by a motion to dismiss, contending that the petition was insufficient to state a cause for relief or a claim for relief which would be cognizant under Rule 60 (b) of the Federal Rules of Civil Procedure. They also filed a response to the petition. Following an extended trial of the issues presented by the pleadings, the District Court filed an exhaustive opinion, ... F. Supp. ..., and entered its order granting permission to suspend the operation of the plan of integration until mid-semester of the 1960-61 school year.

From that order, plaintiffs (appellants) prosecuted an appeal to this Court. Because of the vital importance of the time element in the litigation, and in line with the suggestion of the Supreme Court in its per curiam order of June 30, 1958, on petition for certiorari, we heard the appeal on its merits on August 4, 1958.

A review of the events leading up to the present appeal, as revealed by the record, is necessary to a proper understanding of the meritorious question for decision.

On May 20, 1954, following the decision of the Supreme Court in Brown v. Board of Education on May 17, 1954, 347 U.S. 483, the Board adopted a statement concerning the Brown decision, recognizing its responsibility to comply with Federal Constitutional requirements, and on May 24, 1955--several days prior to the supplemental opinion of the Supreme Court in Brown v. Board of Education, 349 U.S. 294, the Board approved a "Plan of School Integration", which provided for a gradual integration of all public schools, beginning with the high school level, in the Fall of 1957. See Aaron v. Cooper, 143 F. Supp. 855 for the plan in its entirety, aff'd (8Cir.) 243 F.2d 361.

It was the feeling of the Board that the plan, as proposed, was the most desirable and workable under all of the circumstances, and that as the result of an active public relations program, the public generally approved of the plan. However, a systematic campaign developed which undermined whatever confidence the public might have had in the plan to integrate the public schools. In November, 1956, the people of the State of Arkansas adopted: (A) Amendment 44 to the State Constitution, which commanded the General Assembly to oppose by every constitutional method the "Un-Constitutional desegregation decisions of May 17, 1954 and May 31, 1955 (the two Brown decisions) of the United States Supreme Court" (1 Ark. Stat. 1947, 1957 Supplement); (B) A resolution of interposition which, inter alia, called upon the people of the United States and the governments of all the separate states to join the people of Arkansas in securing an adoption of an amendment to the Constitution of the United States which would provide that the powers of the federal government should not be construed to extend to the regulation of the public schools of any state, or to prohibit any state from providing for the maintenance of racially separate but substantially equal public schools within such state; (C) A pupil assignment law dealing with the assignment of individual pupils to individual public schools. The 61st General Assembly of Arkansas, which convened in January, 1957, enacted Sections 80-1519 to 80-1524, Ark. Stat. 1947, known as The Pupil Assignment Law; Section 80-1525, ibid, which relieves school children of compulsory attendance in racially mixed public schools; Sections 6-801 through 6-824, ibid, which established a State Sovereignty Commission; Section 80-539, ibid, which authorizes local school boards to expend district funds in employing counsel to assist in the solution of problems arising out of integration.

During the summer of 1957, anti-integration forces, pointing to the recent Arkansas enactments, petitioned for, and received from the Pulaski Chancery Court at Little Rock, an injunction directed against the Board, restraining any action towards

integrating Little Rock Central High School during the school term beginning September 3, 1957. On August 29, 1957, on application of the Board, the United States District Court at Little Rock entered an order enjoining the use of the state court injunction in an attempt to block the integration plan. We affirmed this order. Thomason v. Cooper (8 Cir.) 254 F.2d 808.

From the testimony of the Superintendent, and voluminous exhibits, consisting mainly of newspaper articles and paid advertisements, it is demonstrated that pro-segregationists carried on a relentless and effective campaign during the summer of 1957. The Governor of Georgia, Marvin Griffin, and Roy V. Harris, publisher, of the same state, and Reverend J. A. Lovell, described as a "Texas Radio Minister," appeared in Little Rock and delivered speeches against integration to large audiences. The effect of these efforts may be gleaned from the Superintendent's testimony; (Mr. Blossom)--"[B]ut there was a tremendous amount of opposition following the appearance of the Governor of Georgia * * * that this plan which had been developed as I explained over a long period of time, seemed to be driven out of everybody's mind. * * * In the minds of people who talked to me the thing that became prevalent [was] 'We don't have to do this when the Governor of Georgia says nobody else has to do it.'" On July 9, 1957, what purports to be a full page paid statement appeared in the Arkansas Democrat, the first two paragraphs of which are typical, not only of the statement in its entirety, but of other articles appearing from time to time in the same publication:

"PEOPLE OF ARKANSAS vs. RACE-MIXING!

OFFICIAL POLICY OF THE STATE OF ARKANSAS

'The People of Arkansas assert that the power to operate public schools in the State on a racially separate but substantially equal basis was granted by the people of Arkansas to the government of the State of Arkansas; and that, by ratification of the Fourteenth Amendment, neither the State of Arkansas nor its people delegated to the federal government, expressly or by implication, the power to regulate or control the operation of the domestic institutions of Arkansas; any and all decisions of the federal courts or any other department of the federal government to the contrary notwithstanding.'

WHOSE STATEMENT IS THE ABOVE?

It is the statement of Gov. Orval E. Faubus of Arkansas. It is the core of the Resolution of Interposition which he personally fathered. Governor

Faubus hired the solicitors who circulated the petitions to place this Resolution on the ballot. Governor Faubus filed Resolution and petitions with the Secretary of State on July 5, 1956, and the Resolution was submitted to the people in last November's general election. THE PEOPLE OF ARKANSAS BY A TREMENDOUS, OVERWHELMING MAJORITY GAVE IT THEIR THUNDERING APPROVAL.

Sponsored by the Governor of Arkansas, adopted by a tremendous majority of Arkansas voters, THE ABOVE STATEMENT IS THE WILL OF THE PEOPLE OF ARKANSAS."

As September 3rd approached, the opposition to Negro children entering Central High School had stiffened and solidified. On the night of September 2d, Governor Faubus appeared on television in Little Rock and announced that in the interest of preserving peace, he had called out units of the National Guard, and had directed that the white schools be placed "off limits" to Negro students, and that the Negro schools be placed "off limits" to white students. The subsequent events, which ultimately brought forth United States troops, and the entry of the nine Negro children in Central High School, are found in our opinion in Faubus v. United States, supra.

The record firmly establishes that although the Negro children attended Central High School during the 1957-58 school term under the protection of Federal troops, and later, federalized national guardsmen, the opposition to the plan of integration by many members of the public, and particularly parents of white students, failed to subside. Whether the white students who were the trouble makers, stood for segregation of the races in schools as the result of their environment over the years, or because of the intense campaign that was focused upon that issue by adults, does not appear, but the indisputable fact is that certain of the white students demonstrated their hostility to integration by overt acts of violence and misconduct, committed within the school building, as well as by destruction of school property through acts of vandalism. The events which occurred during the school year may be summarized as follows:

1) Although there were no unusual events in the classrooms, there were a number of incidents in the halls, corridors, cafeteria and rest rooms, consisting mainly of "slugging, pushing, tripping, catcalls, abusive language, destruction of lockers, and urinating on radiators.

2) Forty-three bomb threats necessitated searches of the school building, and particularly the lockers, some 2400 in number. These bomb threats were broadcast on the local radio and television stations, precipitating calls from parents and withdrawals of students for the day.

3) Numerous small fires occurred within the building, particularly in rest rooms where tissue paper and towels accumulated.

4) The destruction of school property throughout the school necessitated the expenditure of school funds, which might otherwise have been used for general maintenance purposes, to repair the damage.

5) Misconduct on the part of some students resulted in approximately 200 temporary suspensions for short periods of time, and two permanent expulsions.

6) The administrative staff in the school spent a great deal of time making reports of incidents, alleged and real, arising out of opposition to the presence of the nine Negro students.

7) Teachers and administrative staff were subjected to physical and mental strain and telephone threats.

8) Inflammatory anti-integration speeches were made at public meetings by speakers from other states, and the local newspapers carried many anti-integration articles.

9) Vicious circulars were distributed condemning the District Court, the Supreme Court of the United States, and the school officials who recognized the supremacy of the Federal law.

10) Vulgar cards, critical of the school officials, were given by adults to school children for distribution within the school building.

11) In general there was bedlam and turmoil in and upon the school premises, outside of the classrooms.

Careful and critical analysis of the relevant facts and circumstances in light of applicable legal principles, leads us to the inescapable conclusion that the order of the District Court suspending the plan of integration can not stand.

In Brown v. Board of Education, 349 U.S. 294, the Supreme Court, in dealing with the manner in which integration should be effected, recognized that full implementation of the constitutional principles involved may require solution of varied local school problems--and that the school authorities have the primary responsibility for "elucidating, assessing, and solving the problems." While the District Courts, aided and guided by equitable principles, may properly take into account the public interest in the elimination of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in Brown v. Board of Education, May 17, 1954, 347 U.S. 483, it should be emphasized that the Court, in the opinion dealing with

the relief to be granted, stated (349 U.S. at page 300): "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." (Emphasis supplied.)

The precise question at issue herein, i.e., whether a plan of integration, once in operation, may lawfully be suspended because of popular opposition thereto, as manifested in overt acts of violence, has not received judicial consideration. But there is sound and convincing authority that a school board, "acting promptly and completely uninfluenced by private and public opinion as to the desirability of desegregation in the community," must proceed with deliberate speed, consistent with proper administration to abolish segregation. Jackson v. Rawdon (5 Cir. 1956) 235 F.2d 93, 96, certiorari denied 352 U.S. 925; School Board of the City of Charlottesville, Va. v. Allen (4 Cir. 1956) 240 F.2d 59, certiorari denied, 353 U.S. 910; and while "... a good faith acceptance by the school board of the underlying principle of equality of education for all children with no classification by race might well warrant the allowance by the trial court of time for such reasonable steps in the process of desegregation as appears to be helpful in avoiding unseemly confusion * * * [n]evertheless, whether there is such acceptance by the Board or not, the duty of the Court is plain. The vindication of rights guaranteed by the Constitution can not be conditioned upon the absence of practical difficulties." (Emphasis supplied). Orleans Parish School Board v. Bush (5 Cir. 1957) 242 F.2d 156 at p. 166, certiorari denied 354 U.S. 921. "The fact that the school's might be closed if the order were enforced is no reason for not enforcing it," Allen v. County School Board of Prince Edward County, Va., (4 Cir. 1957) 249 F.2d 462, 465, certiorari denied 355 U.S. 953, because, as the Court there stated, at page 465: "A person may not be denied enforcement of rights to which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights."

In his opinion ... F. Supp. ..., which incorporated findings of fact and conclusions of law, Judge Lemley, who has most carefully and conscientiously considered the problem presented, recognized that the occurrences which motivated the instant proceeding were the direct result of general community opposition to integration. He stated:

> "From the practically undisputed testimony of the Board's witnesses we find that although the continued attendance of the Negro students at Central High School was achieved throughout the 1957-58 school year by the physical presence of federal troops, including federalized national guardsmen, nevertheless on account of popular opposition to integration the year was marked by repeated incidents of more or less

serious violence directed against the Negro students and their property, by numerous bomb threats directed at the school, by a number of nuisance fires started inside the school, by desecration of school property, and by the circulation of cards, leaflets and circulars designed to intensify opposition to integration...." (Emphasis added.)

* * * * * * *

"It is important to realize, as is shown by the evidence, that the racial incidents and vandalism which occurred in Central High School during the past year did not stem from mere lawlessness on the part of the white students in the school, or on the part of the people of Little Rock outside the school; nor did they stem from any malevolent desire on the part of the students or others concerned to bomb the school, or to burn it down, or to injure or persecute as individuals the nine Negro students in the school. Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years. The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock, that the Brown Decisions do not truly represent the law, and that by virtue of the 1956-57 enactments, heretofore outlined, integration in the public schools can be lawfully avoided." (Emphasis supplied.)

* * * * * * *

"... In reaching this conclusion we are not unmindful of the admonition of the Supreme Court that the vitality of those principles 'cannot be allowed to yield simply because of disagreement with them'; here, however, as pointed out by the Board in its final brief, the opposition to integration in Little Rock is more than a mere mental attitude; it has manifested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted."

Appalling as the evidence is--the fires, destruction of private and public property, physical abuse, bomb threats, intimidation of school officials, open defiance of the police department of the City of Little Rock by mobs--and the naturally resulting additional expense to the District, disruption of normal educational procedures, and tension, even nervous collapse of the school

personnel, we cannot accept the legal conclusions drawn by the District Court from these circumstances. Over and over again, in the testimony, we find the conclusion that the foregoing turmoil, chaos and bedlam directly resulted from the presence of the nine Negro students in Central High School, and from this conclusion, it appears that the District Court found a legal justification for removing temporarily the disturbing influence, i.e., the Negro students. It is more accurate to state that the fires, destruction of property, bomb threats, and other acts of violence, were the direct result of popular opposition to the presence of the nine Negro students. To our mind, there is a great difference from a legal standpoint when the problem in Little Rock is stated in this manner. From the record it appears that none of the Negro students was responsible for the incidents on the school property, and the one Negro expulsion seems to have resulted after the Negro student was physically struck in the face, following which it was found that the student had "failed to adjust", in violation of an agreement with the school board not to become embroiled in incidents.

This Court recognizes that, following the first Brown decision, the members of the Board, acting in good faith, and working with the Superintendent of Schools, moved promptly to promulgate a plan designed to gradually bring about complete integration in the Little Rock public schools, and they are to be commended for their efforts in that regard. We are also not unmindful of the difficulties which were faced by the board members and school administrators in attempting to give life to the plan of integration. As we have seen, they have been constantly harrassed; they have met with overt opposition from the public, and the legislature through passage of the 1957 enactments. The executive department of the State of Arkansas has openly opposed their efforts, as demonstrated by the statement by the Governor of the official policy of the state of Arkansas against integration, followed by the use of National Guardsmen to prevent entry of Negro students. The result was to place the Board between "the upper and the nether millstone." See Thomason v. Cooper, 254 F.2d 808 at page 810. While it may appear to the members of the Board and the Superintendent, that they have a thankless task, they may be recompensed by the knowledge that throughout, they, as public officers, have recognized their duty to support the Constitution of the United States, and to respect the laws and courts of our Federal Government, and our democratic ideals, regardless of their personal convictions with respect to the wisdom of school integration.

It is not the province of this Court in this proceeding to advise the Board as to the means of implementing integration in the Little Rock schools. We are directly concerned only with the legality of the order under review. We do observe, however, that at no time did the Board seek injunctive relief against those who opposed by unlawful acts the lawful integration plan, which action

apparently proved successful in the Clinton, Tennessee and Hoxie, Arkansas situations. See Kasper v. Brittain, 245 F.2d 92 (6 Cir. 1957), certiorari denied 355 U.S. 834, rehearing denied 355 U.S. 886; Hoxie School District v. Brewer (E.D. Ark.) 137 F.Supp. 364, aff'd Brewer v. Hoxie School District (8 Cir. 1956) 238 F.2d 91. The evidence also affords some basis for belief that if more rigid and strict disciplinary methods had been adopted and pursued in dealing with those comparatively few students who were ring leaders in the trouble making, much of the turmoil and strife within Central High School would have been eliminated.

An impossible situation could well develop if the District Court's order were affirmed. Every school district in which integration is publicly opposed by overt acts would have "justifiable excuse" to petition the courts for delay and suspension in integration programs. An affirmance of "temporary delay" in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violence and unlawful means. The Supreme Court of the United States has specifically determined that segregation in the public schools is a deprivation of the equal protection of laws guaranteed by the Fourteenth Amendment. The Board, by public statement, has recognized its constitutional duty to provide non-segregated educational opportunities for the children of Little Rock; the District Court, in its memorandum opinion, supra, at page ...., stated: "... it is not denied that under the Brown decisions the Negro students in the Little Rock District have a constitutional right not to be excluded from any of the public schools on account of race;". Acting under a federal court order, the Board did proceed with a fair and reasonable program for gradual integration, which program had previously been approved by this Court. The issue plainly comes down to the question of whether overt public resistance, including mob protest, constitutes sufficient cause to nullify an order of the federal court directing the Board to proceed with its integration plan. We say the time has not yet come in these United States when an order of a Federal Court must be whittled away, watered down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto.

Mindful as we are that the incidents which occurred within Central High School produced a situation which adversely affected normal educational processes, we nevertheless are compelled to hold that such incidents are insufficient to constitute a legal basis for suspension of the plan to integrate the public schools in Little Rock. To hold otherwise would result in "*** accession to the demands of insurrectionists or rioters ***", Strutwear Knitting Co. v. Olson, 13 F. Supp. 384 at 391, and Faubus v. U.S., 254 F.2d 797 at 807, and the withholding of rights guaranteed by the Constitution of the United States. Accordingly, the order of the District Court is reversed, with directions to dismiss the appellees' petition.

Gardner, Chief Judge, dissenting.

I would affirm on the grounds stated by Judge Lemley in his opinion. Aaron v.Cooper, E.D. Ark., ... F.Supp. ...

Because of the limitation of time within which this case must be decided it is not possible to prepare a dissenting opinion and, hence, I am preparing only a short memorandum.

It is conceded that the school authorities have acted in good faith both in formulating a plan for integrating and in attempting to implement that plan. Their efforts in this regard were met with unprecedented and unforeseen opposition and resistance as set out and enumerated in the majority opinion. This opposition included acts of violence to such an unprecedented extent that the armed forces of the United States were stationed in and about the school building. The events pertinent to the attempts of the school authorities during the school year to implement its plan for integrating are set forth in the majority opinion. The normal conduct of the school was continuously disrupted and the state of mind, both within and without the school, was to a greater or lesser extent in a state of hysteria. Under circumstances and conditions set out in Judge Lemley's opinion the school authorities made application for an extension of time so as to permit a cooling off or breathing spell so that both pupils, parents, teachers and the public might to some extent become reconciled to the inevitable necessity for public school integration. Having in mind that the school officials and the teaching staff acted in good faith and that the school officials presented their petition for an extension of time in good faith, it was the duty of the court "to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles". Brown v. Board of Education, 349 U.S. 294. In this situation the action of Judge Lemley in extending the time as requested by the school officials was the exercise of his judicial discretion. The background is well set forth in Judge Lemley's opinion. For centuries there had been no intimate social relations between the white and colored races in the section referred to as the South. There had been no integration in the schools and that practice had the sanction of a decision of the Supreme Court of the United States as constitutionally legal. It had become a way of life in that section of the country and it is not strange that this long-established, cherished practice could not suddenly be changed without resistance. Such changes, if successful, are usually accomplished by evolution rather than revolution, and time, patience, and forbearance are important elements in effecting all radical changes. The action of Judge Lemley was based on realities and on conditions, rather than theories. The exercise of his discretion should not, I think, be set aside as it seems to me it was not an abuse of discretion but rather a discretion wisely exercised under the conditions. We should not substitute our judgment for that of the trial court.

Judge Lemley's decision is not without precedent in principle. It is, I think, warranted by the decision of the Supreme Court in Brown v. Board of Education, 349 U.S. 294. See also Allen v. County School Board of Prince Edward County, E.D.Va., ... F.Supp. ...; Davis v. County School Board of Prince Edward County, E.D.Va., 149 F. Supp. 431; Wisconsin v. Illinois, 278 U.S. 367, modified, 281 U.S. 179, 289 U.S. 395, 309 U.S. 569, 311 U.S. 107; Standard Oil Co. v. United States, 221 U.S. 1. It was the judgment of the school officials as indicated by their petition and, after hearing, the judgment of the trial court, that the extension of time requested should be granted. I do not think it can be said that the findings of the trial court and its conclusion based thereon are clearly erroneous. I would affirm.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

WILLIAM G. COOPER, et al., Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and Virgil T. Blossom, Superintendent of Schools,

PETITIONERS

Vs.

No. 16034

JOHN AND THELMA AARON, Minors, by their mother and next friend, (Mrs.) THELMA AARON, et al.,

RESPONDENTS

APPLICATION FOR STAY

William G. Cooper, et al., Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and Virgil T. Blossom, Superintendent of Schools, petitioners herein, pray that the judgment entered in this cause on August 18, 1958, be stayed pending application to the Supreme Court of the United States for certiorari.

Certiorari is applied for in order that the Supreme Court of the United States may finally determine whether an order for school desegregation may be postponed upon a finding that continued implementation has resulted and for a time would continue to result in grave injury to public interests, the educational program, and the welfare of the school children.

Unless a stay of this judgment is granted, petitioners will be irreparably injured during the pendency of the case in the Supreme Court for the reason that in absence of a stay the concededl difficult and dangerous conditions under which the Little Rock

School District has attempted to conduct its program of education during the past school year will be perpetuated and aggravated. While the grave questions involved in this case remain unsettled by the Supreme Court, implementation of the desegregation of schools would create an increasingly intolerable situation caused in large measure by the uncertainty existing until final determination of this matter. Moreover, the appellate jurisdiction of the Supreme Court will be preserved by granting this application for, in the event of its denial, ultimate reinstatement of the District Court decision would effect only partial relief and would not be a remedy for the injury to the schools and to the public interest during pendency of this action. On the other hand, the respondents will not be harmed if a stay is granted, for all that is at stake for them is a modus vivendi until the Supreme Court acts. Enrollment in one of the other fine schools in the Little Rock school system during this period will not, to say the least, be detrimental to the progress of their education.

WHEREFORE, Petitioners pray that the judgment of this Court be stayed pending application to the Supreme Court for certiorari.

Richard C. Butler
Boyle Building
Little Rock, Arkansas
Attorney for Petitioners

I certify that on this 20th day of August, 1958, I have served this Application for Stay upon the Respondents by mailing copies of same to their attorneys, Wiley A. Branton, 119 East Barraque Street, Pine Bluff, Arkansas, and Thurgood Marshall, 10 Columbus Circle, New York 19, New York.

Richard C. Butler
Attorney for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16,034. September Term, 1957

John and Thelma Aaron, minors by their mother and next friend, (Mrs.) Thelma Aaron; et al., Appellants, vs. William G. Cooper, et al., Members of the Board of Directors of the Little Rock, Arkansas Independent School District, et al.	)	Appeal from the United States District Court for the Eastern District of Arkansas.

Opinion of this Court was filed and judgment entered August 18, 1958. Appellants, on August 20, 1958 filed a Motion for issuance of mandate forthwith and Appellees have today filed Application for Stay of Mandate pending proceedings in the Supreme Court of the United States.

These motions have been considered by the Court and it is hereby Ordered that Appellants' Motion for issuance of mandate is denied, and on application of appellees it is Ordered that the issuance of the mandate be, and it is hereby, stayed for a period of thirty days from and after this date, and if within said period there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until final disposition of this case by the Supreme Court.

August 21, 1958.

MOTION FILED AUG 28 1958

IN THE

Supreme Court of the United States

AUGUST, SPECIAL TERM, 1958

MISC. No. 1

JOHN AARON, ET AL., *Petitioners,*

v.

WILLIAM G. COOPER, ET AL., Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, and VIRGIL T. BLOSSOM, Superintendent of Schools, *Respondents.*

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

JOHN BRADLEY MINNICK
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

AUGUST, SPECIAL TERM, 1958

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JOHN AARON, ET AL., *Petitioners,*

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

John Bradley Minnick, appearing for himself and on behalf of all interested citizens similarly situated, moves for leave to file a brief as amicus curiae.

The specific grounds for this motion and request are as follows:

1. As a parent with children in public school, I am entitled to present my brief as a matter of right. Const., Art. VI, cl. 2; Amend. XIV, sections 1 and 5; R. S.,

section 1977, now 42 U. S. C., section 1981; *Pierce* v. *Society of Sisters* (1925) 268 U. S. 510, 534-535.

2. State law is the rule of decision in the Federal Courts unless the Constitution and laws of the United States provide or require otherwise. Federal Rules of Decision Act, First Judicial Code, section 34, First Congress, First Session, Ch. 20, 1789, 1 Stat. 73, 92, now 28 U.S.C., section 1652; *Erie R. Co.* v. *Tompkins* (1938) 304 U. S. 64, 79-80.

3. For the purpose of this and related proceedings dealing with our public free schools, the Constitution and laws of the United States do not provide or require otherwise. Const., Art. I, section 7; Const., Art. III; Const., Art. IV, section 3; Const., Art. VI, cl. 2; Const., Amendments IX, X, XI and Amendment XIV, sections 1 and 5; Acts of Admission of the New States, commencing with the Act to Admit the States of North and South Dakota, Montana and Washington on an equal footing with the original States, section 14, Fiftieth Congress, Second Session, Ch. 180, February 22, 1889, 25 Stat. 676, 680, down to through and including the Act to Admit the State of Alaska on an equal footing with the other states in all respects whatsoever, section 6 (j), Public Law 85-508, 85th Congress, Second Session, July 7, 1958, 72 Stat. 339, 342; THIRD MORRILL ACT, Fifty-First Congress, First Session, Ch. 841, August 30, 1890, 26 Stat. 417, 418, now 7 U. S. C., section 323; see also index to United States Code under Negroes; and note (1) that these laws have not been questioned or challenged upon constitutional or any other ground, (2) nor were these laws raised, briefed, cited, argued or presented to this Court in *Brown* v. *Board of Education of Topeka, Kansas* (1954) 347

U. S. 483, and (3) that these laws constitute the supreme law of the land by constitutional definition, Const., Art. VI, cl. 2; cf., *Gibbons* v. *Ogden* (1824) 9 Wheat. 1, 29, 186-239; *McCulloch* v. *Maryland* (1819) 4 Wheat. 316, 322-330, 400-437.

4. The first opinion of this Court in a twice mooted case, *Brown, supra,* is not legally sufficient authority to negative any federal, state or local law because the defendant was entitled to dismissal as a matter of right. Constitution, *supra;* Rules of Decision Act, *supra;* Third Morrill Act, *supra;* Act to Admit the State of Oklahoma (1906) 34 Stat. 271; *United States* v. *W. T. Grant Co.* (1935) 345 U. S. 629, 632; *Erie R. Co.* v. *Tompkins, supra;* stipulation of equality filed by counsel for the plaintiffs in *Brown, supra,* and the related cases; and the action of the Board of Education of Topeka, Kansas, when it adopted its own plan in 1953 to eliminate separate schools in Topeka, there being no state law or constitutional provision in Kansas which provided or required otherwise.

Respectfully submitted,

JOHN BRADLEY MINNICK
Pro Se.

IN THE

Supreme Court of the United States

AUGUST, SPECIAL TERM, 1958

MISC. No. 1

JOHN AARON, ET AL., *Petitioners,*

v.

WILLIAM G. COOPER, ET AL., Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, and VIRGIL T. BLOSSOM, Superintendent of Schools, *Respondents.*

BRIEF AS AMICUS CURIAE

STATEMENT OF THE CASE

I. The Plan

A. The voluntary plan was approved by the Federal Judiciary over the objections of the petitioners upon authority of the sociological opinion of this Court in a moot case.

B. The plan did not work.

II. The Stay

A. The plan was stayed not only by the District Court below; it had been stayed also by the state court. Both stays were granted after full and complete hearings at the local level.

B. The stay granted by the District Court below was reversed by the United States Court of Appeals for the Eighth Circuit on authority of the sociological opinion of this Court in a moot case; but the reversal was stayed pending perfection of an appeal by the respondents.

III. The Petition

A. Petitioners bring this action to cut off respondent's appeal and to accomplish what was requested in the petition for writ of certiorari, No. 1095, October Term, 1957, denied, June 30, 1958.

B. A special term of Court has been convened to hear the matter.

STATEMENT OF THE ARGUMENT

I. The Problem

The problem is racial, but the issues are constitutional. The problem has created a seemingly irreconcilable conflict between the Federal Judiciary and State Law concerning the basic, fixed principles governing separate schools in public education. Accordingly, something must yield if the problem is to be solved. Only those who are lacking in responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color and religion. *Beauharnais* v. *Illinois* (1952) 343 U. S. 250, 262.

II. The Issue

The issue is not integration. It is not segregation. The issue is whether a sociological opinion in a moot case is legally sufficient to negative the supreme law of the land.

III. The Law

A. The Judicial Precedent

1. According to the Federal Judiciary, the "law" was settled in *Brown* v. *Board of Education of Topeka, Kansas* (May 17, 1954) 347 U. S. 483, a twice mooted case; and by the subsequent "mandate" (May 31, 1955), 349 U. S. 294, which purports to negative all provisions of federal, state and local laws which come in conflict therewith.

2. The "settled" part of the federal law about which the Federal Judiciary and others speak, and which has been generally conceded by state and local counsel for various school boards from Arlington, Virginia, to Dallas, Texas, by way of Little Rock, Arkansas, has no basis or foundation outside of the claims of social scientists affirmed by this Court in a moot case, *Brown* v. *Board of Education of Topeka, Kansas, supra.*

3. The generally accepted definition of a "moot case" in both our state and federal courts is as follows:

> "A moot case is one which seeks to determine an abstract question which does not arise upon existing facts or rights." *Adams* v. *Union R. Co.* (1899) 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273, 276; see also, 27 Words and Phrases, Moot Case, pp. 536-539 and 1958 cumulative supplement; Black's Law Dictionary, Third Edition, p. 1203.

4. The five original so-called "segregation cases" (*Brown* and related cases, *supra*) were first mooted on the facts by the stipulation of equality filed by counsel for the plaintiffs in order to raise an abstract psychological question which did not arise upon existing facts or rights. In addition, the *Brown* case upon which the opinion rests was mooted by the action of the Board

of Education of Topeka in 1953 when it changed its policy and set up its own plan to eliminate separate schools in Topeka, there being no state law or constitutional provision which provided or required otherwise.

5. An opinion in a moot case is not legally sufficient to settle any law because the defendant is entitled to dismissal as a matter of right. *United States* v. *W. T. Grant Co.* (1953) 345 U. S. 629, 632.

B. The Constitutional Law

1. The Constitution and the laws of the United States made in pursuance thereof are the supreme law of the land by constitutional definition. Const., Art. VI, cl. 2; *Gibbons* v. *Ogden* (1824) 9 Wheat. 1; *McCulloch* v. *Maryland* (1819) 4 Wheat. 316.

2. The Constitution is completely silent upon the question education.

3. The power to enforce the provisions of section 1 of the Fourteenth Amendment by appropriate legislation was retained specifically by Congress. Const., Amend. XIV, section 5.

4. Congress acted in pursuance of the Constitution and under section 5 of the Fourteenth Amendment upon the question of separate schools in public education. Third Morrill Act (1890) 26 Stat. 418, now 7 U. S. C., section 323, as indexed in the United States Code under Negroes; and the Act to Admit the State of Oklahoma (1906) 34 Stat. 271.

5. These and related Acts of Congress were not questioned nor challenged upon constitutional or any other ground in *Brown, supra,* nor were these laws of the United States presented, cited, briefed, argued or other-

wise put in issue so that the people could be informed upon the same.

6. The Acts of Admission of the New States provide that the states shall have exclusive control over their public schools forever, including the right to establish and maintain separate schools in public education. These provisions were developed out of the Morrill Acts relating to our Land Grant Colleges. Thus, it appears that there shall be no distinction on account of race or color, provided that separate schools heretofore or hereafter established shall be held by the Federal Judiciary and the Federal Executive to be a compliance if the funds are divided equitably. *Third Morrill Act, supra.* The Acts of Admission and the Morrill Acts contain no severability clause. Hence to negative a substantive provision is to negative the whole and thereby destroy the Union and the Land Grant Colleges.

7. State law is the rule of decision because there is no conflict between the laws of the United States and the laws of the several states; and the Constitution does not provide or require otherwise. Rules of Decision Act, 28 U. S. C., section 1652; *Erie R. Co.* v. *Tompkins* (1938) 304 U. S. 64.

IV. Conclusion

Wherefore it is concluded upon the case and upon the law that the petition should be denied.

Respectfully submitted,

JOHN BRADLEY MINNICK,
Pro Se.

No. 1, Misc.

Office-Supreme Court, U.S.
FILED
AUG 28 1958
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

AUGUST SPECIAL TERM, 1958

JOHN AARON, ET AL., PETITIONERS

v.

WILLIAM G. COOPER, ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF LITTLE ROCK, ARKANSAS, INDEPENDENT SCHOOL DISTRICT, AND VIRGIL T. BLOSSOM, SUPERINTENDENT OF SCHOOLS

ON APPLICATION FOR VACATION OF ORDER OF COURT OF APPEALS FOR EIGHTH CIRCUIT STAYING ISSUANCE OF ITS MANDATE, FOR STAY OF ORDER OF DISTRICT COURT OF EASTERN DISTRICT OF ARKANSAS AND FOR SUCH OTHER ORDERS AS PETITIONERS MAY BE ENTITLED TO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
OSCAR H. DAVIS,
PHILIP ELMAN,
RALPH S. SPRITZER,
Assistants to the Solicitor General,
SEYMOUR FARBER,
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In the Supreme Court of the United States

AUGUST SPECIAL TERM, 1958

No. 1, Misc.

JOHN AARON, ET AL., PETITIONERS

v.

WILLIAM G. COOPER, ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF LITTLE ROCK, ARKANSAS, INDEPENDENT SCHOOL DISTRICT, AND VIRGIL T. BLOSSOM, SUPERINTENDENT OF SCHOOLS

ON APPLICATION FOR VACATION OF ORDER OF COURT OF APPEALS FOR EIGHTH CIRCUIT STAYING ISSUANCE OF ITS MANDATE, FOR STAY OF ORDER OF DISTRICT COURT OF EASTERN DISTRICT OF ARKANSAS AND FOR SUCH OTHER ORDERS AS PETITIONERS MAY BE ENTITLED TO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PRELIMINARY STATEMENT

The prior course of the proceedings in this case are fully set forth in the petitioners' application to Mr. Justice Whittaker, filed on August 22, 1958. The facts which pertain to the merits of the controversy, *i. e.*, the facts which bear upon the question whether

there was adequate legal basis for the district court's order suspending the operation of the previously approved plan of desegregation, are stated in the opinion of the court of appeals, reprinted in the Appendix, *infra*, pp. 21–37.

In this brief, filed in response to the invitation of the Court, we shall discuss, first, our reasons for believing that the Court has full power to grant the relief which is sought, and, secondly, the basis for our conclusion that this relief should be granted.

DISCUSSION

The Government is primarily interested in the preservation and maintenance of public education in accordance with the Constitution. The Government believes that the Nation must be sympathetic and understanding of the difficult problems that have to be dealt with by school districts in bringing about nonsegregation in the schools and cannot fail to appreciate the adjustments that have to be made in school systems which have been operated under a different assumption for a long ferm of years. It recognizes that plans for implementation of the Court's decree may be modified in accordance with equitable principles. As the Government reads the opinions of this Court in *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294, the decision so provides. The Government considers that the Court has allowed wide latitude to carry into effect the decision in accordance with the conditions in the locality and the problems involved. However, there are certain primary considerations:—first, that there be a prompt start; sec-

ond, that the action be taken and continued in good faith and by all reasonable means, under the circumstances, to accomplish the plan; third, that opposition to the decision expressed in violence and unlawful acts does not, solely or of itself, justify the abandonment or modification of the plan; and, fourth, that any change of a plan once placed into effect must provide for active steps and progress toward its objectives during any period of modification.

In the light of these basic considerations, this brief is narrowly addressed to the issues before the Court in this particular proceeding.

I

THIS COURT HAS FULL POWER TO ACT AT THIS TIME UPON PETITIONERS' APPLICATION FOR RELIEF, AND, IN DOING SO, IT SHOULD CONSIDER THE MERITS OF THE CONTROVERSY

A. THE COURT HAS FULL POWER TO PASS UPON THE APPLICATION

There is no doubt that this Court has full power to act upon the present application to vacate the stay, even though a petition for certiorari has not yet been filed by respondents. In comparable cases in which delay would be prejudicial, individual Justices have exercised the power to consider a stay before the Court has been formally seized of the matter through the filing of a petition for certiorari or the taking of an appeal. See, *e. g.*, *Rosenberg* v. *United States,* 346 U. S. 273, 285–286, 324; *Land* v. *Dollar,* 341 U. S. 737, 738; *Fahey* v. *Mallonee,* 332 U. S. 245, stay granted by Mr. Justice Rutledge, Sup. Ct. Journal, Oct. Term, 1946, p. 86 (Dec. 9, 1946); *Johnson* v. *Stevenson,* 335

U. S. 801. As these same cases show, the full Court also has the power to pass upon stay applications, and it has exercised that authority when the occasion arose. Cf. *United States* v. *Ohio*, 291 U. S. 644.

In two recent cases involving school problems, the Court has affirmatively exercised its stay powers in a similar situation. In *Tureaud* v. *Board of Supervisors*, 346 U. S. 881, a stay was granted of a Fifth Circuit judgment "which is to be brought here for review in a petition for certiorari." And in *Lucy* v. *Adams*, 350 U. S. 1, the Court reinstated an injunction which had been stayed by the district court (pending appeal) and which a circuit judge had refused to reinstate.[1]

The Court's plenary authority to grant or deny stays, interim injunctions, or other preliminary relief flows from its position as the highest judicial tribunal in the nation with both appellate and supervisory jurisdiction over the lower federal courts. The court of appeals' judgment will come before this Court on petition for certiorari,[2] and Section 2106 of Title 28 vests the Court with full power to affirm, modify, vacate, set aside or reverse that judgment. The All-Writs Statute (28 U. S. C. 1651) grants the Court full authority to issue all writs necessary or

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[1] The district court had enjoined officials of the University of Alabama from denying admission to Autherine Lucy and another; the same court then stayed its injunction pending an appeal; a judge of the court of appeals thereafter denied a motion to vacate the suspension and to reinstate the injunction.

[2] The stay issued by the court of appeals assumes that the respondents will file a petition for certiorari.

appropriate in aid of its jurisdiction. And the Court likewise has a general supervisory authority over the federal judicial system. See *Rosenberg* v. *United States,* 346 U. S. 273, 285–287; *Calvaresi* v. *United States,* 348 U. S. 961. It goes without saying that this complex of powers cannot be defeated by postponing the filing of a petition for certiorari until appropriate interim relief can no longer be afforded.

B. IN PASSING UPON THE APPLICATION, THE COURT SHOULD WEIGH THE PROBABILITY OF A REVERSAL OF THE JUDGMENT BELOW

As indicated in the stay order of the court of appeals, the only purpose of a stay of that court's judgment at this stage of the litigation would be to give this Court an opportunity to consider whether or not to review the judgment below, and, if so, to consider the merits. It is therefore fully appropriate for the Court—now convened in an extraordinary Special Term to consider the application for relief—to determine whether or not it will grant certiorari to review the judgment below, and even to consider whether it would affirm if certiorari were granted. In *Lucy* v. *Adams,* 350 U. S. 1, the Court obviously considered the merits in passing upon the stay application,[3] and it apparently did so in *Tureaud* v. *Board of Supervisors,* 346 U. S. 881. See also *Johnson* v. *Stevenson,* 335 U. S. 801; *Rosenberg* v. *United States,* 346 U. S. 273 (in which the Court, on a motion to vacate a stay, extensively considered the merits). In this case, too, if at this Special Term the Court

[3] Cases dealing with the invalidity of school segregation were cited in the *per curiam* opinion.

finds no reason to review the judgment below or if it agrees that that decision is correct, there could be no further reason for the stay granted by the court of appeals. In its *per curiam* opinion of last June 30th, the Court recognized the "vital importance of the time element in this litigation" and the need for judicial action "in ample time to permit arrangements to be made for the next school year." 357 U. S. 566, 567.

If there should be any doubt of the propriety of considering the merits at this time when only the application for relief is before the Court, it would be appropriate to call upon the present respondents (the Board of Directors of the Little Rock, Arkansas, Independent School District, and the Superintendent of Schools) to file a petition for certiorari at once, instead of waiting for thirty days as they may do under the Eighth Circuit's stay order. In *Ex parte Quirin*, 317 U. S. 1, the petitioners filed such petitions during the course of argument (317 U. S. at 6) and those petitions were promptly considered and granted (317 U. S. at 18).[4]

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[4] We believe that actually there is no occasion for doubt. It is settled practice that the courts, in determining whether a judgment should be stayed in the interest of the losing party (here, the respondents), will make a determination as to whether there is any substantial likelihood that such party can prevail on the merits. See *Virginian Ry.* v. *United States*, 272 U. S. 658, 673–674; *Air Line Pilots Ass'n, Internat'l* v. *Civil Aeronautics Bd.*, 215 F. 2d 122, 125 (C. A. 2); *Madison Square Garden Corporation* v. *Braddock*, 90 F. 2d 924, 927 (C. A. 3); *Tennessee Valley Authority* v. *Tennessee Electric Power Co.*, 90 F. 2d 885, 892–893 (C. A. 6); *Embassy Dairy, Inc.* v. *Camalier*, 211 F. 2d 41, 43–45 (C. A. D. C.)

II

THE RELIEF SOUGHT BY PETITIONERS SHOULD BE GRANTED BECAUSE THERE IS NO LIKELIHOOD THAT RESPONDENTS CAN PREVAIL ON THE MERITS

A. THERE IS NO LEGAL BASIS FOR REVERSAL OF THE COURT OF APPEALS' DECISION

At the outset, it should be stressed that this case involves a petition to postpone the effective dates of a school plan duly adopted and in effect, not an issue as to whether a plan or particular type of plan should be accepted or approved.

The decision of the district court rested upon two basic misconceptions: first, as to the governing principles laid down by this Court for determining when a delay in carrying out a school desegregation plan may be allowed; and, secondly, as to the extent to which constitutional rights may be nullified or impaired because of hostile actions taken by those opposed to the exercise of such rights.

First. (*a*) On May 17, 1954, this Court unanimously declared that racial segregation in public schools is unconstitutional. *Brown* v. *Board of Education,* 347 U. S. 483, 495, and companion cases. Because the five cases before the Court arose under different local conditions and involved a variety of local problems, the Court requested further argument on the question of relief. It invited the Attorney General of the United States and the Attorneys General of all states in which racial segregation in public schools was required or permitted to appear as *amici curiae* to present their views. Comprehensive briefs on the question of relief were submitted to the Court by the parties and the *amici,* and the oral argument extended over a period of four days (April 11–14,

1955). The Court's opinion and judgment were announced on May 31, 1955. *Brown* v. *Board of Education*, 349 U. S. 294. Any analysis of the Court's opinion must take into consideration the arguments which were made to the Court, some of which were accepted and others rejected.

Essentially, three lines of argument were made to the Court on the question of relief. On the one side, the plaintiffs contended that there was no justification, legal or factual, for any delay in enforcing their constitutional right to enter non-segregated public schools, and that the Court should require desegregation "forthwith". On the other side, the defendants and some of the *amici* pointed out that racial segregation in public schools had been in existence in more than one-third of the states and in the District of Columbia for almost a century; that during its existence it enjoyed the sanction of decisions of the Court and was believed by many people to be necessary in order to preserve amicable relations between the races; and that school segregation was part of a larger social pattern of racial relationships which reflected the mores and folkways prevalent in large areas of the country. They contended, therefore, that the Court should not go beyond its declaration of the constitutional principle, and that it should leave implementation of the principle to the voluntary conduct of the communities and individuals concerned, without imposing any limitation as to time. The United States, however, proposed a middle course. It suggested that the cases be remanded to the lower courts with directions to require the defendant school boards either to admit the plaintiffs forthwith to non-segre-

gated public schools or to propose promptly for the lower court's consideration and approval an effective plan for accomplishing desegregation as soon as practicable. It proposed that the defendants should bear the burden of proof on the question of whether, and how long, an interval of time in carrying out full desegregation is required, and that no program should receive judicial approval unless it called for an immediate and substantial start toward desegregation, in a good-faith effort to end segregation as soon as feasible.

This Court unanimously rejected the two extreme views and accepted, in essence, the proposed middle course. It stated explicitly that "the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling." 349 U. S. at 300. If additional time for carrying out the ruling is requested, it added, the "burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." *Ibid.* The Court specifically enumerated factors which the lower courts might consider as justifying the allowance of additional time: "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U. S. at 300–301. The factor of community hostility or

opposition to desegregation was not included in the list. The Court dismissed in a single sentence the suggestion that the plaintiffs should forego their "personal and present" right (cf. *Sweatt* v. *Painter*, 339 U. S. 629, 635) not to be segregated while attending public schools until such time as others in the community might be agreeable:— "* * * it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U. S. at 300.

In short, the Court made it clear that mere popular hostility, where it exists, can afford no legal justification for depriving Negro children of their constitutional right. The Court was explicit in its insistence that there be "good-faith compliance at the earliest practicable date." Where additional time was sought, it could be allowed only where necessary in order "to effectuate a transition to a racially non-discriminatory school system." Additional time, where permitted, must be for the purpose of enabling the authorities to take necessary constructive measures—measures looking towards full compliance. The Court thus indicated that it will not countenance delay as a mere interlude during which little or nothing would be done to effectuate transition to a nonsegregated system.

(*b*) On the face of it, the district court's decision in the present case rests on the consideration of factors which this Court ruled out as inadmissible.

The Little Rock plan of school desegregation [5] was

[5] The full details of this plan are set out in *Aaron* v. *Cooper*, 243 F. 2d 361 (C. A. 8) and *Faubus* v. *United States*, 254 F. 2d 797 (C. A. 8).

carefully worked out over a period of three years. Under the plan, complete desegregation was not to be effected until 1963. Previously challenged by these petitioners as being too slow, it was nonetheless approved by the district court and by the court of appeals as being "in present compliance with the law" as expressed by this Court's mandate.

The plan, ordered put into effect "forthwith,"[6] has been in operation for an entire school year. In the instant proceeding, however, the district court ordered a suspension in the operation of the plan theretofore approved. The justification, in the district court's words, is "the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years."[7] The manifestation of this opposition by certain "overt acts which have actually damaged educational standards" is given as a further reason.

This Court's mandate, however, required a prompt beginning, and, thereafter, progress with "all deliberate speed." The Court countenanced the possibility of delay only to the extent that time might be necessary in order to work out constructive measures for accomplishment of the transition. It declared that the constitutional principles might not yield

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[6] See *Aaron* v. *Cooper*, 156 F. Supp. 220, 225 (E. D. Ark.).

[7] The opinion suggests, in this connection, that "the people of Little Rock might be much more willing to acquiesce in integration as contemplated by the plan" after the completion of certain pending litigation in the state courts of Arkansas.

"simply because of disagreement with them." As it recently stated the proposition in another context (exclusion of Negroes from grand jury service in Orleans parish, Louisiana), "local tradition cannot justify failure to comply with the constitutional mandate requiring equal protection of the laws." *Eubanks* v. *Louisiana*, 356 U. S. 584, 588.[8]

The district court's disposition of this case, as the court below has held, cannot be squared with these admonitions. It does not require constructive measures of implementation; it endorses a moratorium in order to "wait and see" what may happen.

Second. The district court did not rely solely on its finding that there were traditions and attitudes in the community which were hostile to desegregation. It gave weight to the fact that the opposition "is more than a mere mental attitude" and has "mani-

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[8] The Fourth and Fifth Circuits have both held that "local tradition" cannot excuse a failure to proceed expeditiously in compliance with this Court's decision in the school cases. *Allen* v. *County School Board of Prince Edward Co., Va.*, 249 F. 2d 462 (C. A. 4); *School Board of City of Charlottsville, Va.* v. *Allen*, 240 F. 2d 59 (C. A. 4); *Jackson* v. *Rawdon*, 235 F. 2d 93 (C. A. 5), certiorari denied, 352 U. S. 925. As Chief Judge Hutcheson stated in the *Jackson* case (235 F. 2d at 96), a school board has a duty to abolish segregation "completely uninfluenced by private and public opinion as to the desirability of desegregation in the community * * *".

fested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted."

This reliance upon overt manifestations of opposition to desegregation reflects the fundamental error in the district court's decision. For inherent in that ruling is the idea that the constitutional rights of some citizens may be suspended or ignored because of the antagonistic acts of others. If constitutional rights could be so easily negated, they would amount to little. Here, it should be noted, there is not the slightest suggestion that the colored children did anything to incite violence or disorderly conduct. Because they were colored, their mere presence in the school led others to engage in the conduct which the district court thought to be sufficient justification for suspending the children's constitutional rights—rights which can be enforced only while they are of school age, so that any "suspension" of their rights is actually a permanent and irretrievable deprivation.

This Court has rejected the claim that a restriction upon the rights of Negroes might be justified as a means of avoiding racial disturbance. "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted," the Court said. "But its solution cannot be promoted by depriving citizens of their constitutional rights and

privileges." *Buchanan* v. *Warley*, 245 U. S. 60, 80–81.[9]

The court below has stated in the instant case (Appendix, *infra*, p. 34), that it would create an "impossible situation" if the district court's order were sustained. "Every school district in which integration is publicly opposed by overt acts would have 'justifiable excuse' to petition the courts for delay and suspension in integration programs. An affirmance of 'temporary delay' in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means." *Ibid.*

B. BOTH THE SCHOOL AUTHORITIES AND THE DISTRICT COURT CAN ADOPT MEASURES CALCULATED TO PROTECT PETITIONERS' CONSTITUTIONAL RIGHTS

We believe that the decision of the court of appeals is correct in that it recognizes that the narrow grounds of opposition, violence and unlawful acts do not justify a postponement of the plan.

We point out additionally that, as in the case of any application for equitable relief, the respondents were obligated to do everything within their power before they could obtain relief from the court. Had an affirmative burden of proving need for additional time been assumed and the case proved on justifiable and equitable grounds, the Court would have a different problem before it.

As the court below observed (Appendix, *infra*, p. 34, the school authorities and the district court are not without means to deal with the prevailing situation and to protect petitioners' constitutional rights.

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[9] Cf. *Moore* v. *Dempsey*, 261 U. S. 86, 90 (right to a fair and orderly trial may not be surrendered "to appease the mob spirit") and *Terminiello* v. *Chicago*, 337 U. S. 1, 5 (speech might not be suppressed because it "stirred people to anger, invited public dispute, or brought about a condition of unrest").

1. Respondents can obtain injunctive relief to protect them from outside interference with the performance of their constitutional duties

While it may be true, as the district court found, that "deep-seated popular opposition to the principle of integration" exists in Little Rock, it is clear that the active instigators of obstruction are limited in number. In response to interrogatories put to them by petitioners, respondents were readily able to name the individuals and the organization primarily responsible for the "campaign of opposition" to their plan.[10] Respondents can seek—and, if the practical necessities require, they have a duty to seek—injunctive relief against this band of troublemakers. This is precisely what was done by the school authorities of Hoxie School District No. 46, also in Arkansas, when their plan of desegregation met with massive interference spearheaded by a small group. Indeed, it should be noted that one of the defendants against whom injunctive relief was sought in that case,[11] Amis Guthridge, is also named by respondents here as being among the active obstructionists to school integration in Little Rock.[12]

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[10] "The persons * * * are Amis Guthridge, Robert Ewing Brown, Theo Dillaha, Sr., Will J. Brown, the Reverend Wesley Pruden, and innumerable other persons who are members of Capitol Citizens Council, an association incorporated under the laws of the State of Arkansas, all of whom are residents of Little Rock. * * *"

[11] *Hoxie School Dist. No. 46 of Lawrence Co., Ark.* v. *Brewer*, 137 F. Supp. 364 (E. D. Ark.).

[12] Moreover, in addition to three other individual defendants, injunctive relief in the *Hoxie* case was sought and obtained against White America, Inc., a corporation organized and operating under the laws of the State of Arkansas, Citizens Com-

In the *Hoxie* case, the defendants challenged the authority of the School Board to seek injunctive relief. The district court responded by stating (*Hoxie School District No. 46 of Lawrence Co., Ark.* v. *Brewer,* 137 F. Supp. 364, 367 (E. D. Ark.)):

> If the defendants in fact conspired to deprive (among others) Negro pupils of their constitutional rights, then it would seem proper for the plaintiffs, so closely related as they were to the victims in this case, to bring a restraining suit. They were officials of a great state and an omission by them would, in effect, be a deprivation of rights under color of law.

The court of appeals agreed (*Brewer* v. *Hoxie School District No. 46,* 238 F. 2d 91, 101 (C. A. 8)):

> * * * [T]here is no question that * * * school board members may be protected by a federal injunction in their efforts to discharge their duty under the Fourteenth Amendment.

In similar fashion, the Court of Appeals for the Sixth Circuit sustained the right of the school authorities of Clinton, Tennessee, to petition the district court for injunctive relief against John Kasper and an organized group of followers who sought "to impede, obstruct and intimidate" them from carrying out a desegregation order of the court. *Kasper* v. *Brittain,* 245 F. 2d 92, 94 (C. A. 6), certiorari denied, 355 U. S. 834.

Even in the absence of an application for injunctive

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mittee Representing Segregation in the Hoxie Schools, an unincorporated association, and White Citizens Council of Arkansas, an unincorporated association.

relief on the part of respondents, the district court, sitting as a court of equity, had ample power to direct that such relief be sought. *Faubus* v. *United States et al.*, 254 F.2d 797 (C. A. 8), pending on petition for a writ of certiorari, No. 212, Oct. Term, 1958. If intervention by the court was indeed necessary to deal with the threat of interference, then certainly the remedy to be fashioned was one directed *at* the obstructionists, not in their favor.

2. Respondents can maintain firmer discipline within Central High School

In Paragraph 11 of their "Substituted Petition," respondents, after reciting the outside interference which they have encountered, state:

> A large majority of the pupils in Central High School have exhibited the highest type of good citizenship in their daily scholastic activities, but a small group, with the encouragement of certain adults, has absorbed the prevailing spirit of defiance and has almost daily created incidents which make it exceedingly difficult for teachers to teach and for pupils to learn. The existing pupil unrest, teacher unrest, and parent unrest, likewise make it difficult for the District to maintain a satisfactory educational program.

The group of students interfering with the plan numbered no more than twenty-five (Tr. 72).[13] Despite numerous and repeated instances of slugging, kicking, spitting, name-calling and wanton destruction of school

[13] Of these twenty-five, there were "five or ten" students who were known to be the ringleaders of the group (Tr. 64).

property,[14] only two students were expelled (Appendix, *infra*, p. 28).

Mr. J. O. Powell, Central High School's own Vice-Principal of Boys, was convinced that if the school adopted and carried out a firm policy of long-term suspension and, if necessary, permanent expulsion of serious troublemakers, the problems of the past school year would be considerably reduced (Tr. 72, 74–75). These views were shared by petitioners' two expert witnesses, Dr. Rogers, Dean of the School of Education of Syracuse University, and Dr. Salten, City Superintendent of Schools at Long Beach, New York (Tr. 366–386; 446–458).

3. There has been no showing that respondents have invoked the assistance of other responsible state agencies

The primary responsibility for maintaining order in the community and taking all other necessary measures to the end that the decree of the district court may be duly carried out rests upon the State and its officials. See *City of Chicago* v. *Sturges*, 222 U. S. 313, 322; *Sterling* v. *Constantin*, 287 U. S. 378, 404. Respondents are state officials and, as such, obligated under the Constitution to administer the public schools of the District so that public education will be available on a non-discriminatory basis. *Board of Education* v. *Barnette*, 319 U. S. 624, 637. Respondents petitioned the district court to relieve them from this obligation on the ground that opposition to the admission of colored school children had assumed serious proportions. But, according to the

[14] See Tr. 50, 51, 111–112.

record, they failed to show that they sought assistance from other duly constituted authorities of the State to aid them in the performance of their duties.

Thus, there is no evidence in the record to indicate that determined local authorities cannot handle, if necessary, any future disturbance occurring in or around Central High School. There was no showing that, prior to coming into court, respondents had even consulted with local law enforcement agencies. Nor was there any showing that they sought to enlist the aid of the Mayor of Little Rock, the City Manager, or any other official of the State.

CONCLUSION

The jurisdiction of this Court has been properly invoked. Since the decision of the court of appeals is clearly correct and there is no likelihood that respondents can prevail on the merits, the relief sought by petitioners should be granted.

Respectfully submitted.

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AUGUST 1958.

APPENDIX

In the United States Court of Appeals for the Eighth Circuit

No. 16034

JOHN AND THELMA AARON, MINORS, BY THEIR MOTHER AND NEXT FRIEND, (MRS.) THOMAS AARON; ET AL., APPELLANTS

vs.

WILLIAM G. COOPER, ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF THE LITTLE ROCK, ARKANSAS INDEPENDENT SCHOOL DISTRICT, AND VIRGIL T. BLOSSOM, SUPERINTENDENT OF SCHOOLS, APPELLEES

[August 18, 1958]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

Before GARDNER, Chief Judge, and SANBORN, WOODROUGH, JOHNSEN, VOGEL, VAN OOSTERHOUT and MATTHES, Circuit Judges.

MATTHES, *Circuit Judge.*

This appeal is another in a series of legal actions which followed the adoption and implementation of a plan for gradual integration of the public schools in Little Rock, Arkansas, as set up by the school board in that district, and approved by the United States District Court for the Eastern District of Arkansas, and by this Court. See *Aaron* v. *Cooper* (E. D. Ark. 1956) 143 F. Supp. 855, *aff'd* 243 F. 2d 361 (8 Cir. 1957); *Thompson* v. *Cooper* (8 Cir. 1958) 254 F. 2d

808; *Faubus* v. *United States* (8 Cir. 1958) 254 F. 2d 797.

In conformity with the plan, and under the direction of the Superintendent of Schools of the Little Rock School District (hereinafter called "District") approximately sixty Negro students were meticulously screened prior to the opening of schools in September, 1957. Seventeen were accepted for entrance in the final two years in high school, but when eight of the students voluntarily withdrew, the nine remaining attempted to enter the school when it opened. After a series of skirmishes, resulting in the placing of troops around the Central High School building, (see *Faubus* v. *United States*, supra), the nine Negro students were admitted and eight of them attended the full year. On February 20, 1958, the members of the school board hereinafter called "Board") and the Superintendent, filed a petition in the United States District Court, Eastern District of Arkansas, Western Division, asking that the plan of integration "be realistically reconsidered in the light of existing conditions," and that it be postponed until such time as the concept of "all deliberate speed" could be clearly defined. Thereafter, the Honorable Harry J. Lemley, United States District Judge for the Eastern and Western Districts of Arkansas, was designated by the Chief Judge of this Circuit to hear and determine the issues presented by the petition. At the District Court's direction appellees filed an amended petition in which they alleged that in light of existing conditions they were of the opinion that a suspension of operations under the plan until January, 1961, was reasonable and advisable. Appellants attacked the petition by a motion to dismiss, contending that the petition was insufficient to state a cause for relief or a claim for relief which would be cognizant under

Rule 60 (b) of the Federal Rules of Civil Procedure. They also filed a response to the petition. Following an extended trial of the issues presented by the pleadings, the District Court filed an exhaustive opinion, . . . F. Supp. . . ., and entered its order granting permission to suspend the operation of the plan of integration until mid-semester of the 1960–61 school year.

From that order, plaintiffs (appellants) presented an appeal to this Court. Because of the vital importance of the time element in the litigation, and in line with the suggestion of the Supreme Court in its per curiam order of June 30, 1958, on petition for certiorari, we heard the appeal on its merits on August 4, 1958.

A review of the events leading up to the present appeal, as revealed by the record, is necessary to a proper understanding of the meritorious question for decision.

On May 20, 1954, following the decision of the Supreme Court in *Brown* v. *Board of Education* on May 17, 1954, 347 U. S. 483, the Board adopted a statement concerning the *Brown* decision, recognizing its responsibility to comply with Federal Constitutional requirements, and on May 24, 1955—several days prior to the supplemental opinion of the Supreme Court in *Brown* v. *Board of Education*, 349 U. S. 294, the Board approved a "Plan of School Integration", which provided for a gradual integration of all public schools, beginning with the high school level, in the Fall of 1957. See *Aaron* v. *Cooper*, 143 F. Supp. 855 for the plan in its entirety, *aff'd* (8 Cir.) 243 F. 2d 361.

It was the feeling of the Board that the plan, as proposed, was the most desirable and workable under all of the circumstances, and that as the result of an

active public relations program, the public generally approved of the plan. However, a systematic campaign developed which undermined whatever confidence the public might have had in the plan to integrate the public schools. In November, 1956, the people of the State of Arkansas adopted: (A) Amendment 44 to the State Constitution, which commanded the General Assembly to oppose by every constitutional method the "Un-Constitutional desegregation decisions of May 17, 1954 and May 31, 1955 (the two *Brown* decisions) of the United States Supreme Court" (1 Ark. Stat. 1947, 1957 Supplement); (B) A resolution of interposition which, inter alia, called upon the people of the United States and the governments of all the separate states to join the people of Arkansas in securing an adoption of an amendment to the Constitution of the United States which would provide that the powers of the federal government should not be construed to extend to the regulation of the public schools of any state, or to prohibit any state from providing for the maintenance of racially separate but substantially equal public schools within such state; (C) A pupil assignment law dealing with the assignment of individual pupils to individual public schools. The 61st General Assembly of Arkansas, which convened in January, 1957, enacted Sections 80–1519 to 80–1524, Ark. Stat. 1947, known as The Pupil Assignment Law; Section 80–1525, ibid, which relieves school children of compulsory attendance in racially mixed public schools; Sections 6–801 through 6–824, ibid, which established a State Sovereignty Commission; Section 80–539 ibid, which authorizes local school boards to expend district funds in employing counsel to assist in the solution of problems arising out of integration.

During the summer of 1957, anti-integration forces, pointing to the recent Arkansas enactments, petitioned for, and received from the Pulaski Chancery Court at Little Rock, an injunction directed against the Board, restraining any action towards integrating Little Rock Central High School during the school term beginning September 3, 1957. On August 29, 1957, on application of the Board, the United States District Court at Little Rock entered an order enjoining the use of the state court injunction in an attempt to block the integration plan. We affirmed this order. *Thomason* v. *Cooper* (8 Cir.) 254 F. 2d 808.

From the testimony of the Superintendent, and voluminous exhibits, consisting mainly of newspaper articles and paid advertisements, it is demonstrated that pro-segregationists carried on a relentless and effective campaign during the summer of 1957. The Governor of Georgia, Marvin Griffin, and Roy V. Harris, publisher, of the same state, and Reverend J. A. Lovell, described as a "Texas Radio Minister," appeared in Little Rock and delivered speeches against integration to large audiences. The effect of these efforts may be gleaned from the Superintendent's testimony; (Mr. Blossom)—"[B]ut there was a tremendous amount of opposition following the appearance of the Governor of Georgia * * * that this plan which had been developed as I explained over a long period of time, seemed to be driven out of everybody's mind. * * * In the minds of people who talked to me the thing that became prevalent [was] 'We don't have to do this when the Governor of Georgia says nobody else has to do it.'" On July 9, 1957, what purports to be a full page paid statement appeared in the Arkansas Democrat, the first two paragraphs of which are typical, not only of the statement in its

entirety, but of other articles appearing from time to time in the same publication:

> "PEOPLE OF ARKANSAS vs. RACE-MIXING! OFFICIAL POLICY OF THE STATE OF ARKANSAS
>
> "The People of Arkansas assert that the power to operate public schools in the State on a racially separate but substantially equal basis was granted by the people of Arkansas to the government of the State of Arkansas; and that, by ratification of the Fourteenth Amendment, neither the State of Arkansas nor its people delegated to the federal government, expressly or by implication, the power to regulate or control the operation of the domestic institutions of Arkansas; *any and all decisions of the federal courts or any other department of the federal government to the contrary notwithstanding.*"
>
> WHOSE STATEMENT IS THE ABOVE?
>
> It is the statement of Gov. Orval E. Faubus of Arkansas. It is the core of the Resolution of Interposition which he personally fathered. Governor Faubus hired the solicitors who circulated the petitions to place this Resolution on the ballot. Governor Faubus filed Resolution and petitions with the Secretary of State on July 5, 1956, and the Resolution was submitted to the people in last November's general election. THE PEOPLE OF ARKANSAS BY A TREMENDOUS, OVERWHELMING MAJORITY GAVE IT THEIR THUNDERING APROVAL.
>
> Sponsored by the Governor of Arkansas, adopted by a tremendous majority of Arkansas voters, THE ABOVE STATEMENT IS THE WILL OF THE PEOPLE OF ARKANSAS."

As September 3rd approached, the opposition to Negro children entering Central High School had

stiffened and solidified. On the night of September 2d, Governor Faubus appeared on television in Little Rock and announced that in the interest of preserving peace, he had called out units of the National Guard, and had directed that the white schools be placed "off limits" to Negro students, and that the Negro schools be placed "off limits" to white students. The subsequent events, which ultimately brought forth United States troops, and the entry of the nine Negro children in Central High School, are found in our opinion in *Faubus* v. *United States,* supra.

The record firmly establishes that although the Negro children attended Central High School during the 1957–58 school term under the protection of Federal troops, and later, federalized national guardsmen, the opposition to the plan of integration by many members of the public, and particularly parents of white students, failed to subside. Whether the white students who were the trouble makers, stood for segregation of the races in schools as the result of their environment over the years, or because of the intense campaign that was focused upon that issue by adults, does not appear, but the indisputable fact is that certain of the white students demonstrated their hostility to integration by overt acts of violence and misconduct, committed within the school building, as well as by destruction of school property through acts of vandalism. The events which occurred during the school year may be summarized as follows:

(1) Although there were no unusual events in the classrooms, there were a number of incidents in the halls, corridors, cafeteria and rest rooms, consisting mainly of "slugging, pushing, tripping, catcalls, abusive language, destruction of lockers, and urinating on radiators.

(2) Forty-three bomb threats necessitated searches of the school building, and particularly the lockers,

some 2400 in number. These bomb threats were broadcast on the local radio and television stations, precipitating calls from parents and withdrawal of students for the day.

(3) Numerous small fires occurred within the building, particularly in rest rooms where tissue paper and towels accumulated.

(4) The destruction of school property throughout the school necessitated the expenditure of school funds, which might otherwise have been used for general maintenance purposes, to repair the damage.

(5) Misconduct on the part of some students resulted in approximately 200 temporary suspensions for short periods of time, and two permanent expulsions.

(6) The administrative staff in the school spent a great deal of time making reports of incidents, alleged and real, arising out of opposition to the presence of the nine Negro students.

(7) Teachers and administrative staff were subjected to physical and mental strain and telephone threats.

(8) Inflammatory anti-integration speeches were made at public meetings by speakers from other states, and the local newspapers carried many anti-integration articles.

(9) Vicious circulars were distributed condemning the District Court, the Supreme Court of the United States, and the school officials who recognized the supremacy of the Federal law.

(10) Vulgar cards, critical of the school officials, were given by adults to school children for distribution within the school building.

(11) In general there was bedlam and turmoil in and upon the school premises, outside of the classrooms.

Careful and critical analysis of the relevant facts and circumstances in light of applicable legal principles, leads us to the inescapable conclusion that the order of the District Court suspending the plan of integration can not stand.

In *Brown* v. *Board of Education,* 349 U. S. 294, the Supreme Court, in dealing with the manner in which integration should be effected, recognized that full implementation of the constitutional principles involved may require solution of varied local school problems—and that the school authorities have the primary responsibility for "elucidating, assessing, and solving the problems." While the District Courts, aided and guided by equitable principles, may properly take into account the public interest in the elimination of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in *Brown* v. *Board of Education,* May 17, 1954, 347 U. S. 483, it should be emphasized that the Court, in the opinion dealing with the relief to be granted, stated (349 U. S. at page 300): "But it should go without saying that the vitality of these constitutional principles *cannot be allowed to yield simply because of disagreement with them.*" [Emphasis supplied.]

The precise question at issue herein, i. e., whether a plan of integration, once in operation, may lawfully be suspended because of popular opposition thereto, as manifested in overt acts of violence, has not received judicial consideration. But there is sound and convincing authority that a school board, "acting promptly and *completely uninfluenced by private and public opinion* as to the desirability of desegregation in the community," must proceed with deliberate speed, consistent with proper administration, to abolish segregation, *Jackson* v. *Rawdon* (5

Cir. 1956) 235 F. 2d 93, 96, *certiorari denied* 352 U. S. 925; *School Board of the City of Charlottesville, Va.* v. *Allen* (4 Cir. 1956) 240 F. 2d 59, *certiorari denied*, 353 U. S. 910; and while "* * * a good faith acceptance by the school board of the underlying principle of equality of education for all children with no classification by race might well warrant the allowance by the trial court of time for such reasonable steps in the process of desegregation as appears to be helpful in avoiding unseemly confusion * * * [n]evertheless, whether there is such acceptance by the Board or not, the duty of the Court is plain. *The vindication of rights guaranteed by the Constitution can not be conditioned upon the absence of practical difficulties.*" [Emphasis supplied.] *Orleans Parish School Board* v. *Bush* (5 Cir. 1957) 242 F. 2d 156 at p. 166, *certiorari denied* 354 U. S. 921. "The fact that the schools might be closed if the order were enforced is no reason for not enforcing it," *Allen* v. *County School Board of Prince Edward County, Va.*, (4 Cir. 1957) 249 F. 2d 462, 465, *certiorari denied* 355 U. S. 953, because, as the Court there stated, at page 465: "A person may not be denied enforcement of rights to which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights."

In his opinion * * * F. Supp. * * *, which incorporated findings of fact and conclusions of law, Judge Lemley, who has most carefully and conscientiously considered the problem presented, recognized that the occurrences which motivated the instant proceeding were the direct result of general community opposition to integration. He stated:

> "From the practically undisputed testimony of the Board's witnesses we find that although the continued attendance of the Negro students

at Central High School was achieved throughout the 1957–58 school year by the physical presence of federal troops, including federalized national guardsmen, *nevertheless on account of popular opposition to integration* the year was marked by repeated incidents of more or less serious violence directed against the Negro students and their property, by numerous bomb threats directed at the school, by a number of nuisance fires started inside the school, by desecration of school property, and by the circulation of cards, leaflets, and circulars designed to intensify opposition to integration. * * *" [Emphasis added.]

* * * * *

"It is important to realize, as is shown by the evidence, that the racial incidents and vandalism which occurred in Central High School during the past year did not stem from mere lawlessness on the part of the white students in the school, or on the part of the people of Little Rock outside the school; nor did they stem from any malevolent desire on the part of the students or others concerned to bomb the school, or to burn it down, or to injure or persecute as individuals the nine Negro students in the school. *Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration,* which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years. The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock, that the Brown Decisions do not truly represent the law, and that by virtue of the 1956–57 enactments, heretofore outlined, integration in the public schools can be lawfully avoided." [Emphasis supplied.]

* * * * *

"* * * In reaching this conclusion we are not unmindful of the admonition of the Supreme

> Court that the vitality of those principles 'cannot be allowed to yield simply because of disagreement with them'; here, however, as pointed out by the Board in its final brief, the opposition to integration in Little Rock is more than a mere mental attitude; it has manifested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted."

Appalling as the evidence is—the fires, destruction of private and public property, physical abuse, bomb threats, intimidation of school officials, open defiance of the police department of the City of Little Rock by mobs—and the naturally resulting additional expense to the District, disruption of normal educational procedures, and tension, even nervous collapse of the school personnel, we cannot accept the legal conclusions drawn by the District Court from these circumstances. Over and over again, in the testimony, we find the conclusion that the foregoing turmoil, chaos and bedlam directly resulted from the presence of the nine Negro students in Central High School, and from this conclusion, it appears that the District Court found a legal justification for removing temporarily the disturbing influence, i. e., the Negro students. It is more accurate to state that the fires, destruction of property, bomb threats, and other acts of violence, were the direct result of popular *opposition to* the presence of the nine Negro students. To our mind, there is a great difference from a legal standpoint when the problem in Little Rock is stated in this manner. From the record it appears that none of the Negro students was responsible for the incidents on the school property, and the one Negro expulsion seems to have resulted after the Negro student was physically struck in the face, following which it was found that the student had "failed to adjust", in

violation of an agreement with the school board not to become embroiled in incidents.

This Court recognizes that, following the first *Brown* decision, the members of the Board, acting in good faith, and working with the Superintendent of Schools, moved promptly to promulgate a plan designed to gradually bring about complete integration in the Little Rock public schools, and they are to be commended for their efforts in that regard. We are also not unmindful of the difficulties which were faced by the board members and school administrators in attempting to give life to the plan of integration. As we have seen, they have been constantly harassed; they have met with overt opposition from the public, and the legislature through passage of the 1957 enactments. The executive department of the State of Arkansas has openly opposed their efforts, as demonstrated by the statement by the Governor of the official policy of the state of Arkansas against integration, followed by the use of National Guardsmen to prevent entry of Negro students. The result was to place the Board between "the upper and the nether millstone." See *Thomason* v. *Cooper,* 254 F. 2d 808 at page 810. While it may appear to the members of the Board and the Superintendent, that they have a thankless task, they may be recompensed by the knowledge that throughout, they, as public officers, have recognized their duty to support the Constitution of the United States, and to respect the laws and courts of our Federal Government, and our democratic ideals, regardless of their personal convictions with respect to the wisdom of school integration.

It is not the province of this Court in this proceeding to advise the Board as to the means of implementing integration in the Little Rock Schools. We are directly concerned only with the legality of

the order under review. We do observe, however, that at no time did the Board seek injunctive relief against those who opposed by unlawful acts the lawful integration plan, which action apparently proved successful in the Clinton, Tennessee and Hoxie, Arkansas situations. See *Kasper* v. *Brittain,* 245 F. 2d 92 (6 Cir. 1957), *certiorari denied* 355 U. S. 834, *rehearing denied* 355 U. S. 886; *Hoxie School District* v. *Brewer* (E. D. Ark.) 137 F. Supp. 364, *aff'd Brewer* v. *Hoxie School District* (8. Cir. 1956) 238 F. 2d 91. The evidence also affords some basis for belief that if more rigid and strict disciplinary methods had been adopted and pursued in dealing with those comparatively few students who were ring leaders in the trouble making, much of the turmoil and strife within Central High School would have been eliminated.

An impossible situation could well develop if the District Court's order were affirmed. Every school district in which integration is publicly opposed by overt acts would have "justifiable excuse" to petition the courts for delay and suspension in integration programs. An affirmance of "temporary delay" in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means. The Supreme Court of the United States has specifically determined that segregation in the public schools is a deprivation of the equal protection of laws guaranteed by the Fourteenth Amendment. The Board, by public statement, has recognized its constitutional duty to provide non-segregated educational opportunities for the children of Little Rock; the District Court, in its memorandum opinion, *supra,* at page * * *, stated: "* * * it is not denied that under the Brown decisions the Negro students in the Little

Rock District have a constitutional right not to be excluded from any of the public schools on account of race;". Acting under a federal court order, the Board did proceed with a fair and reasonable program for gradual integration, which program had previously been approved by this Court. The issue plainly comes down to the question of whether overt public resistance, including mob protest, constitutes sufficient cause to nullify an order of the federal court directing the Board to proceed with its integration plan. *We say the time has not yet come in these United States when an order of a Federal Court must be whittled away, watered down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto.*

Mindful as we are that the incidents which occurred within Central High School produced a situation which adversely affected normal educational processes, we nevertheless are compelled to hold that such incidents are insufficient to constitute a legal basis for suspension of the plan to integrate the public schools in Little Rock. To hold otherwise would result in "* * * accession to the demands of insurrectionists or rioters * * *", *Strutwear Knitting Co.* v. *Olson,* 13 F. Supp. 384 at 391, and *Faubus* v. *U. S.*, 254 F. 2d 797 at 807, and the withholding of rights guaranteed by the Constitution of the United States. Accordingly, the order of the District Court is reversed, with directions to dismiss the appellees' petition.

GARDNER, *Chief Judge,* dissenting.

I would affirm on the grounds stated by Judge Lemley in his opinion. *Aaron* v. *Cooper,* E. D. Ark., * * * F. Supp. * * *

Because of the limitation of time within which this case must be decided it is not possible to prepare a

dissenting opinion and, hence, I am preparing only a short memorandum.

It is conceded that the school authorities have acted in good faith both in formulating a plan for integrating and in attempting to implement that plan. Their efforts in this regard were met with unprecedented and unforeseen opposition and resistance as set out and enumerated in the majority opinion. This opposition included acts of violence to such an unprecedented extent that the armed forces of the United States were stationed in and about the school building. The events pertinent to the attempts of the school authorities during the school year to implement its plan for integrating are set forth in the majority opinion. The normal conduct of the school was continuously disrupted and the state of mind, both within and without the school, was to a greater or lesser extent in a state of hysteria. Under circumstances and conditions set out in Judge Lemley's opinion the school authorities made application for an extension of time so as to permit a cooling off or breathing spell so that both pupils, parents, teachers and the public might to some extent become reconciled to the inevitable necessity for public school integration. Having in mind that the school officials and the teaching staff acted in good faith and that the school officials presented their petition for an extension of time in good faith, it was the duty of the court "to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles". *Brown* v. *Board of Education,* 349 U. S. 294. In this situation the action of Judge Lemley in extending the time as requested by the school officials was the exercise of his judicial discretion. The background is well set forth in Judge Lemley's opinion. For centuries there had been no intimate social rela-

tions between the white and colored races in the section referred to as the South. There had been no integration in the schools and that practice had the sanction of a decision of the Supreme Court of the United States as constitutionally legal. It had become a way of life in that section of the country and it is not strange that this long-established, cherished practice could not suddenly be changed without resistance. Such changes, if successful, are usually accomplished by evolution rather than revolution, and time, patience, and forbearance are important elements in effecting all radical changes. The action of Judge Lemley was based on realities and on conditions, rather than theories. The exercise of his discretion should not, I think, be set aside as it seems to me it was not an abuse of discretion but rather a discretion wisely exercised under the conditions. We should not substitute our judgment for that of the trial court. Judge Lemley's decision is not without precedent in principle. It is, I think, warranted by the decision of the Supreme Court in *Brown* v. *Board of Education,* 349 U. S. 294. See also *Allen* v. *County School Board of Prince Edward County,* E. D. Va., * * * F. Supp. * * *; *Davis* v. *County School Board of Prince Edward County, E. D. Va.,* 149 F. Supp. 431; *Wisconsin* v. *Illinois,* 278 U. S. 367, modified, 281 U. S. 179, 289 U. S. 395, 309 U. S. 569, 311 U. S. 107; *Standard Oil Co.* v. *United States,* 221 U. S. 1. It was the judgment of the school officials as indicated by their petition and, after hearing, the judgment of the trial court, that the extension of time requested should be granted. I do not think it can be said that the findings of the trial court and its conclusion based thereon are clearly erroneous. I would affirm.

U. S. GOVERNMENT PRINTING OFFICE 1958

MOTION FILED SEP 4 1958

IN THE

Supreme Court of the United States

.....TERM, 1958

No.....

JAMES MADISON BURKE, for himself and in behalf of, and as next friend of the people of the United States of America,

Plaintiffs,

vs.

EARL WARREN, Chief Justice of the Supreme Court of the United States of America, and Associate Justices, and the State of Maryland

Defendants,

SUIT FOR DECLARATORY JUDGMENT

IN RE LITTLE ROCK

JAMES M. BURKE,
801 Beechfield Ave.,
Baltimore 29, Md.

Attorney in Fact.

King Bros., Inc., 208 N. Calvert St., Baltimore 2, Md.

IN THE

Supreme Court of the United States

.....TERM, 1958

JAMES MADISON BURKE, et al,

Plaintiffs,

vs.

EARL WARREN, et al,

Defendants,

MOTION FOR LEAVE TO FILE SUIT FOR DECLARATORY JUDGMENT IN RE LITTLE ROCK

To the Honorable, the Judges of said Court:

James M. Burke, plaintiff, for himself and in behalf, of, and as next friend of the people of the United States of America, moves this Honorable Court for leave to file suit for Declaratory Judgment in the instant matter, because the hearing on the controversy at bar violates the Constitution of the United States of America.

1. If a constitutional question arises the parties to the controversy are not properly joined.

a. A petition for a writ of Certiorari (No. 212) Filed July 24th, 1958 in the matter of Orval E. Faubus, et al, *vs.* United States of America, et al, addressed to the United States Court of Appeals for the Eighth Circuit is now be-

fore this Honorable Court and Governor Faubus has not been joined in the instant controversy,

b. Plaintiff herein has suit pending against the United States of America, (James Madison Burke *vs.* United States of America and the State of Maryland) titled Motion for Rehearing in re Brown *vs.* Board of Education, filed 1954 prior to Brown supra and raising the constitutional question of the rights of the people when their rights under the Constitution are abrogated by the Courts in exercising their Equity powers,

c. Plaintiff has a mandatory appeal pending before this Court from the Circuit Court for Baltimore County, State of Maryland, in re Burke *vs.* Eisenhower, from a decision dismissing plaintiff in the matter of the use of troops to enforce integration and whether such action constitutes a class denial of the Constitutional rights of the people of the United States of America,

2. If a constitutional question does not arise in the instant controversy, the Court is acting arbitrarily and capriciously in such a way as to endanger our Republican form of Government,

3. The facts in the matter before this Court are obscured because of discrepancies in the record sent down from the Court of Appeals for the Eighth Circuit,

4. Equity follows the Law, as a matter of fact, and this Court is powerless to exercise jurisdiction to determine what is a reasonable time when under the Supreme Law of the Land established by the Constitution of the United States of America only Congress has that right, otherwise it is left to the people,

5. The Chief Justice has publically proclaimed that the responsibility of the judiciary is not only to decide the

law but to administer it, and this leaves the people of the United States completely in a quandry, not being quite sure whether such public statements represent the meaning of the Constitution or whether such statements represent behavior unbecoming to a public officer,

Wherefore Plaintiffs' move that the suit for Declaratory Judgment be set down for hearing to determine whether the Courts can administer under their Equity power that which is denied to them under the Supreme Law of the Land, and

Plaintiffs move further that the present Court disqualify itself to hear the motion and the suit, in order that plaintiffs' may petition the Government of the United States to enlarge the Court to hear this matter.

Respectfully submitted,

JAMES M. BURKE,

Attorney in Fact.

IN THE

Supreme Court of the United States

.....TERM, 1958

JAMES MADISON BURKE, et al,

v.

EARL WARREN, et al,

SUIT FOR DECLARATORY JUDGMENT

IN RE LITTLE ROCK

To the Honorable, the Judges of said Court:

James Madison Burke, a citizen of the State of Maryland and of the United States of America, in his own behalf and as next friend of the People of the United States of America, and who resides at 801 Beechfield Avenue, Baltimore 29, Maryland, complains to this Honorable Court, saying:

1. That the jurisdiction of the Court is invoked under the diversity of citizenship rule of Article III, Section 2 of the Constitution of the United States of America,

2. That the Honorable members of this Court and the retired members thereof are disqualified to hear the petitioners in the instant controversy praying that a stay order entered in subject controversy by the United States Court of Appeals for the Eighth Circuit be vacated, by virtue of public pronouncements by the Chief Justice of the Court

reflecting the *policy* of said Court that contravenes the Constitution of the United States,

3. That the Honorable members of this Court and the retired members thereof are disqualified to hear the petitioners in the instant controversy praying that the decision of the Court of Appeals of the Eighth Circuit, reversing an order of the United States District Court for the District of Little Rock be sustained, because of similar public pronouncements by the Chief Justice and members of this Honorable Court which reflect a *policy* of said Court that contravenes the Constitution of the United States,

4. That the damages to plaintiffs are not calculable,

Therefore plaintiff's asks for a jury trial to determine the issue of whether the present court is disqualified to hear the instant controversies and similar cases.

Respectfully submitted,

JAMES M. BURKE,
801 Beechfield Ave.,
Baltimore 29, Md.

Attorney in Fact.

MOTION FILED SEP 9 1958

IN THE SUPREME COURT

of the

UNITED STATES OF AMERICA

SPECIAL TERM, 1958

No. 1

AARON, et al,

vs

Cooper, et al

MOTION TO FILE

BRIEF OF AMICUS CURIAE

THE PEOPLE OF THE UNITED STATES

To the Honorable the Judges of Said Court:

Proponents move this Honorable Court for leave to file Brief of Amicus Curiae for reasons stated in the STATEMENT to the brief.

Respectfully submitted,

James M. Burke
801 Beech Field Ave.
Baltimore, 29, Md.
For himself, and in behalf of and as next friend of the people of the United States of America.

IN THE SUPREME COURT

of the

UNITED STATES OF AMERICA

SPECIAL TERM, 1958

No.1

AARON, et al,

vs

Cooper, et al

BRIEF OF AMICUS CURIAE

THE PEOPLE OF THE UNITED STATES

James M. Burke
801 Beech Field Ave.
Baltimore, 29, Md.
For himself, and in behalf of and as next friend of the people of the United States of America.

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STATEMENT

James M. Burke, for himself and in behalf of others, including all of the people of the United States of America, has litigation pending before this Honorable Court pertaining to the subject controversy entitling him to file this brief as amicus curiae, in no wise implying that he joins the people in this controversy.

QUESTIONS INVOLVED

There are two questions promulgated by the Court, that go to the heart of the controversy; these are, in essence:

1. Can we defer a program of this kind merely because there are elements in the community that would commit violence to prevent it from going into effect?

2. Why aren't the two decisions of this Court the national policy?

ARGUMENT

1. "But can we defer a program (plan) of this kind merely because there are those elements in the community that would commit violence to prevent it from going into effect?"

Warren, C. J.

We submit that the question connotes danger of the gravest sort. Hear Edmund Burke in his address before parliament on conciliation with America:

"If then, Sir, it seems almost desperate to think of any alternative course, for changing the moral causes (and not quite easy to remove the natural) which produce prejudices irreconcileable to the late exercise of our authority; but

that the spirit infallibly will continue, and continuing will produce such effects as now ambarrass us, the second mode under consideration is, to prosecute that spirit in its overt acts as criminal.

"At this proposition I must pause a moment. The thing seems a great deal too big for my ideas of jurisprudence. It should seem, to my way of conceiving such matters, that there is a very wide difference in reason and policy between the mode of proceding on the irregular conduct of scattered individuals, or even of bands of men, who disturb order within the state, and the civil dissensions which may from time to time, on great questions agitate the several communities which compose a great empire. It looks to me to be narrow and pedantic, to apply the ordinary ideas of criminal justice to this great public contest. I do not know the method of drawing up an indictment against a whole people. I cannot insult and ridicule the feelings of millions of my fellow creatures, as Sir Edward Coke insulted one excellent individual (Sir Walter Raleigh) at the bar. I am not ripe to pass sentence on the gravest public bodies, intrusted with magistracies of great authority and dignity, and charged with the safety of their fellow-citizens, upon the very same title that I am. I really think, that for wise men this is not judicious; for sober men not decent; for minds tinctured with humanity not mild and merciful.

"Perhaps, Sir, I am mistaken in my idea of an empire, as distinguished from a single state or kingdom. But my idea of it is this, that an empire is the aggregate of many states under one common head; whether this head be a monarch or a presiding republic. It does, in such constitutions, frequently happen (and nothing but the dismal, cold, dead

uniformity of servitude can prevent its happening) that the subordinate parts have many local privileges and immunities. Between these privileges and the supreme common authority the line may be extremely nice. Of course disputes, often too very bitter disputes, and much ill blood will arise. But though every privilege is an exemption (in the case) from the ordinary exercise of the supreme authority it is no denial of it. The claim of a privilege seems rather, ex vi termini, to imply a superior power. For to talk of the privileges of a state or of a person, who has no superior, is hardly any better than speaking nonsense. Now, in such unfortunate quarrels, among the component parts of a great political union of communities, I can scarcely conceive anything more completely imprudent than for the head of the empire to insist, that, if any privilege is pleaded against his will, or his acts, that his whole authority is denied; instantly to proclaim rebellion, to beat to arms, and to put the offending provinces under the ban. Will not this, Sir, very soon teach the provinces to make no distinctions on their part? Will it not teach them that the government, against which a claim of liberty is tantamount to high treason, is a government to which submission is equivalent to slavery? It may not always be quite convenient to impress dependent communities with such an idea.

"We are indeed, in all disputes with the colonies, by the necessity of things, the judge. It is true, Sir. But I confess, that the character of judge in my own cause, is a thing that frightens me. Instead of filling me with pride, I am exceedingly humbled by it. I cannot proceed with a stern, assured, judicial confidence, until I find myself in something more like a judicial character. I must have these hesitations as long as I am compelled to recollect, that, in

my little reading upon such contests as these, the sense of mankind has, at least as often decided against the superior as the subordinate power. Sir, let me add too, that the opinion of my having some abstract right to my favor would not put me much at my ease in passing sentence; unless I could be sure, that there were no rights which in their exercise under certain circumstances, were not the most odious of all wrongs, and the most vexatious of all injustice. Sir, these considerations have great weight with me, when I find things so circumstanced, that I see the same party, at once a civil litigent against me in point of right, and a culprit before me; whilst I sit as criminal judge, on acts of his, whose moral quality is to be decided upon the merits of that very litigation. Men are every now and then, put, by the complexity of human affairs, into strange situations; but justice is the same, let the judge be in what situation he will.

* * * *

"In this situation, let us seriously and cooly ponder. What is it we have got by all our menaces, which have been many and ferocious? What advantage have we derived from the penal laws we have passed, and which, for the time, have been severe and numerous? What advances have we made towards an object, by the sending of a force, which by land and sea, is no contemptible strength? Has the disorder abated? Nothing less. When I see things in this situation, after such confident hopes, bold promises, and active exertions, I cannot, for my life, avoid a suspicion, that the plan itself is not correctly right."

2. "Why aren't the two decisions of this Court, the first one which laid down as a constitutional requirement that this Court unanomiously felt compelled to agree upon,

and the second opinion, recognizing that this was a change of what had been supposed to be the provision of the Constitution, and recognizing that and the kind of life that had been built under the contrary conception, said, as equity has also said, you must make appropriate accommodation to the specific circumstances of the situation instead of having a procrustean bed where everybody's legs are cut off or stretched to fit the length of the bed - and who is better to decide that than the local United States judges - why isn't that a national policy?

"Why hasn't that national policy, why wasn't that enforced in Little Rock, in the Little Rock district when the school board submitted a plan after mature consideration, after enlisting public support in its behalf, submitted it to the Court where it was contested and the Court said, 'yes, this satisfies the policies laid down in the second Brown decision?'

"Why there, that deference to the local situation in the enforcement of what was laid down as a national policy? National policy doesn't mean the same thing must take place in Little Rock, Ark., as in Pittsfield, Mass. For some things yes, but not for this kind of thing. There was a national policy and the federal courts recognized it. It was sustained by the district court over the opposition of the parents or whoever acted in behalf of these children, went before the court of appeals and the court of appeals said, 'Yes, this is a fair carrying out of that which the Supreme Court laid down.'

"I do not understand what is meant by saying, 'Let's wait until we get a national policy,' if that isn't a national policy."

Frankfurter, J.

We respectfully submit to this Honorable Court that the Court is confused as to this question, and that its confusion stems from the argument of counsel before this Court at the hearings preceding the second Brown decision, and that the arguments made in respect to the Equity powers of this Court constitute a fraud, not only upon the people, who were not represented in the formulation of this so-called national policy, but upon the Court as well.

Look to the briefs filed in compliance with the invitation of Court at that hearing. They reek with identical citations of cases, decided in Equity by this Honorable Court, yet not one of which relates to a similar circumstance such as the controversy we have here. For example, in the Amicus Curiae brief of the Attorney General of Maryland at page 8 we find:

In the words of the Solicitor General of the United States, in an address before the Judicial Conference of the Fourth Circuit, on June 29, 1954:

"In our system the Supreme Court is not merely the adjudicator of controversies, but in the process of adjudication it is in many instances the final formulator of national policy. It should therefore occasion no wonder, if the Court seeks the appropriate time to consider and decide important questions, just as Congress or any other policy-making body might -----. In the decision of great constitutional questions, especially those which are in the realm of political controversy, timing can be of supreme importance."

We put it to the Court, from whence does this alleged national policy derive?

From the 14th Amendment to that Constitution? We think not, for therein is prescribed who has the power to enforce that amendment.

What then? From Equity? We think not. A unanimous opinion of this court said:

"If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

W. Va. State Bd. of Ed.
vs Barnette
319 U.S. 624
187 L.Ed. 1628 (1943)

Jackson, J.

What then? From prior decisions of this court? We think not and cite another unanimous opinion of this Court:

"The proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in, the grant of powers that Congress has, is in direct conflict with the doctrine that this government is one of enumerated powers. That this is such a government clearly appears from the Constitution, for otherwise it would be an instrument granting certain specified things made to operate so as to grant other and distinct things. This natural construction of the original body of the Constitution is made certain by the Tenth Amendment which was seemingly adopted with the premonition of just such a contention."

Kansas vs Colorado
306 U.S. 46
51 L.Ed. 956 (1907)

From fraud and mistake? Certainly it was fraud if the Solicitor General was speaking literally when in 1955, subsequent to the Brown case, he stated in an address before the Zionist organization: "When we win, we must be sure that we have won fairly." Certainly it was a mistake if the Court relied on the Amicus Curiae brief of the Attorney General of

Maryland relative to the Courts powers in Equity proceedings. Certainly it was both fraud and mistake if the Government, in its haste to implement this alleged national policy moved a judge from another district so fast that he forgot to take the oath of office at the station to which he was assigned, as did the judge who implemented it.

Hear again the words of Edmund Burke: "None of us would not risk his life rather than fall under a government purely arbitrary. But, although there are some amongst us who think our Constitution wants many improvements to make it a complete system of liberty, perhaps none who are of that opinion would think it right tc aim at such improvement by disturbing his country and risking everything that is dear to him -- Aristotle, the great master of reasoning, cautions us, and with great weight and propriety, against this species of delusive geometrical accuracy in moral arguments as the most fallacious of all sophistry."

CONLUSION

We respectfully urge this Honorable Court that, without deciding the issues in this case, Equity could, and should, stay further proceedings for a period of two and one-half years, retaining jurisdiction of the controversy in this Court pending further hearings in the premises.

Respectfully submitted,

James M. Burke
801 Beechfield Ave.,
Baltimore 29, Md.,
for himself and in behalf
of and as next friend of
the people of the United States.

Department of Justice

FOR IMMEDIATE RELEASE
TUESDAY, SEPTEMBER 9, 1958

Attorney General William P. Rogers made public today the following letters:

September 7, 1958

Honorable Dean Dauley
City Manager
Little Rock, Arkansas

Dear Mr. Dauley:

As you know, the Supreme Court on September 11, 1958, will hear arguments on whether the Little Rock Central High School should open on a non-segregated basis on September 15, 1958. Because of the possibility that the Supreme Court may affirm the decision of the Eighth Circuit Court of Appeals it seems desirable that careful plans should be made now by responsible officials to prevent disorder or violence in the event of such affirmance.

With this objective in mind, the purpose of this letter is to say that the Department of Justice and its representatives in Little Rock, the United States Attorney and the United States Marshal for the Eastern District of Arkansas, are ready to cooperate fully with the City of Little Rock and the Little Rock Police within the limits of our respective responsibilities.

The Department of Justice has made arrangements for the temporary expansion of the present staff of the United States Marshal's Office. It is important that this action should not be misconstrued or misunderstood by anyone. It is not the purpose of the Marshal to assume, substitute for, or in any way intrude upon the primary responsibility of the state and its subdivisions to maintain peace and order.

Our federal-state system of government necessitates both state and national authorities in the same geographical area at the same time, each operating in their proper sphere of responsibility. The presence of one should not affect the duty or limit the responsibility of the other. The history of our Republic has made clear, too, the wisdom of reposing the primary duty for the preservation of peace and order permanently with the state authorities. Because of this fact the United States Marshal and his deputies do not propose to serve as peace officers, but plan to perform their proper functions to assist in the execution of the orders of the United States Courts and to do it cooperatively in a way which will be helpful to you.

By effective use of the city police, other law enforcement officers of the state and locality, with the cooperation of the Department of Justice as indicated, it is hoped that mob violence and disorder may be prevented. Surely our national interest requires all public officials who have responsibility in this matter to strive earnestly and resolutely to that end.

The United States Marshal, and other officers of this Department as may be appropriate, are ready to confer with you at your earliest convenience in an effort to work out mutually satisfactory plans within our areas of responsibility.

With kind regards,

Sincerely,

/s/ William P. Rogers

Attorney General

September 7, 1958

Mr. Wayne Upton
President, Little Rock School Board
Little Rock, Arkansas

Dear Mr. Upton:

In view of the short period of time between the hearing scheduled for September 11 in the Supreme Court of the United States and the opening of Little Rock Central High School scheduled for September 15, I thought it might be helpful if I wrote to you now. In view of the possibility that the Supreme Court may affirm the decision of the Eighth Circuit Court of Appeals and vacate the order of Judge Lemley, it seems advisable to consider steps which might be taken to prevent obstruction of the orders of the District Court and in the hope of preventing an outbreak of violence.

You will recall that the Court of Appeals, in its recent opinion in the matter, said:

> "We do observe, however, that at no time did the Board (Little Rock School Board) seek injunctive relief against those who opposed by unlawful acts the lawful integration plan, which action apparently proved successful in the Clinton, Tennessee and Hoxie, Arkansas situations."

In view of this observation by the Court and because such a course of action might be effective in preserving order, I am sure that the School Board will want to consider seeking such relief. Recognizing the problems which confront the School Board in this connection, the purpose of this letter is to advise you that the Department of Justice is prepared to give its cooperation and to assist in any way which may be helpful to you in making the suggested application to the District Court.

I realize the position the School Board is maintaining before the Supreme Court, and this letter is not an attempt to affect that position in any way. It is written rather in the hope, whatever the

contingency, that with careful, advance planning by responsible officials concerned each will be able effectively to perform the solemn duties imposed on him by law, and that violence and disorder, which are so harmful to the national interest, may be thus prevented.

Officers of the Department of Justice will be ready to confer with you, your counsel, or any representative or representatives of the Little Rock School Board, as soon as it is convenient for you.

Sincerely,

/s/ William P. Rogers

Attorney General

No. 1 MISC.

IN THE DISTRICT COURT OF THE UNITED STATES

EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

JOHN AARON et al., Plaintiffs

vs. Civil Action No. 3113

WILLIAM G. COOPER et al., Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, and VIRGIL T. BLOSSOM, Superintendent of Schools, Defendants

ORDER

On this day the Court having considered the petition of the defendants in the above styled cause wherein they pray for a modification of the orders of this Court, entered on August 28, 1956, and September 3, 1957, respectively, so as to permit a temporary suspension of the defendants' plan for the gradual racial integration of the public schools in Little Rock, Arkansas, and being well and fully advised, and having filed herein its memorandum opinion in connection with said petition, incorporating therein its findings of fact and conclusions of law,

IT IS BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendants be, and they hereby are, granted permission to suspend the operation of said plan of integration until mid-semester of the 1960-61 school year without being considered, either collectively or individually, in contempt of this Court.

The Court retains jurisdiction of this cause for such other and further proceedings as may hereafter become necessary or appropriate.

This the 20 day of June, 1958.

/s/ Harry J. Lemley
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF ARKANSAS

WESTERN DIVISION

JOHN AARON, ET AL, vs. WILLIAM G. COOPER, ET AL, Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and VIRGIL T. BLOSSOM, Superintendent of Schools,	Plaintiffs Defendants	Civil Action No. 3113

MEMORANDUM OPINION

This cause is now before the Court upon the petition of the defendants, members of the School Board of Little Rock, Arkansas, and the Superintendent of Schools, for an order permitting them to suspend until January, 1961, the operation of the plan of gradual racial integration in the Little Rock public schools, which plan was adopted by the Board in 1955, and was approved by the Court in 1956, the Court of Appeals affirming. Aaron v. Cooper, DC, Ark., 143 F. Supp. 855, aff'd., 8 Cir., 243 F2d 361. This petition has been tried to the Court and the Court having considered the pleadings, briefs and evidence, and being well and fully advised, doth file this memorandum opinion, incorporating herein its findings of fact and conclusions of law.

In order that the issues tendered by the Board's petition may be intelligently understood, a brief history of this litigation is desirable:

Prior to the decisions of the Supreme Court of the United States in the Brown cases (Brown v. Board of Education, 347 U.S. 483, and 349 U.S. 294) the public school system in Little Rock, like all other public school systems in the State of Arkansas, was operated on a racially segregated basis. A few days after the first Brown

decision was rendered the Board announced that it was commencing studies looking toward the establishment of an integrated school system; and in 1955, a few days prior to the rendition of the second Brown decision, the Board announced a plan of gradual integration extending over a period of years, the plan to go into operation with respect to the high school grades at the commencement of the 1957-58 school year.[1]

Thereafter, the plaintiffs in this case, who are Negro children of school age residing within the Little Rock School District, commenced a class action against the members of the Board and the Superintendent of Schools attacking the plan. The case was tried by Judge John E. Miller of Ft. Smith, who was sitting in the Eastern District of Arkansas under a special assignment. As indicated, the plan was approved, and the Court dismissed the prayer of the complaint for declaratory and injunctive relief, and retained jurisdiction of the case for the purpose of entering such other and further orders as might be necessary to obtain the plan's effectuation.[2]

At the time the plan was adopted, the Board recognized that the vast majority of the people of Little Rock was opposed to integration, but it was felt by the Board that the plan would be acceptable as the best one obtainable under the circumstances, and that it would be workable if put into operation in September, 1957. As time went on, however, opposition to integration increased in intensity not only in Little Rock but throughout the State as a whole, as is shown by the fact that in the general election in November, 1956, the people of the State by substantial majorities adopted: (a). Amendment No. 44 to the Arkansas Constitution of 1874, which amendment directed the Arkansas Legislature to take appropriate action and pass laws opposing

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1. The plan is set out verbatim and thoroughly discussed in the district court's opinion in Aaron v. Cooper, supra.

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2. In the very recent case of Thomason v. Cooper, et al, 8 Cir., ____F2d_____, a phase of this litigation, as will hereinafter appear, the Court of Appeals in construing Judge Miller's decree, said that in effect it ordered the Board to put the plan into operation at the beginning of the 1957-58 school year.

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"in every Constitutional manner" the decisions of the Supreme Court in the Brown cases; (b) A resolution of interposition which, among other things, called upon the people of the United States and the governments of all of the separate states to join the people of Arkansas in securing the adoption of an amendment to the Constitution of the United States, which would provide that the powers of the federal government should not be construed to extend to the regulation of the public schools of any state, or to include a prohibition to any state to provide for the maintenance of racially separate but substantially equal public schools within such state; (c) A pupil assignment law dealing with the assignment of individual pupils to individual public schools.

And the 61st General Assembly, which met in January, 1957, passed four statutes, one of which established a State Sovereignty Commission; another of which relieved school children of compulsory attendance in racially mixed public schools; the third of which required certain persons and organizations engaged in certain activities, including those affecting integration, to register with and make periodic reports to the State Sovereignty Commission; and the fourth of which authorized local school boards to expend district funds in employing counsel to assist them in the solution of problems arising out of integration.

In August, 1957, Mrs. Clyde Thomason, a white person, filed a suit against the Board and the Superintendent in the Chancery Court of Pulaski County, the purpose of which suit was to enjoin them from putting the plan into operation; that suit was based, in part at least, upon the legislation heretofore mentioned. A hearing was held before the Chancellor, and on August 29, 1957, a temporary restraining order was issued. At that time Judge Ronald N. Davies of Fargo, North Dakota, was sitting in the Eastern District of Arkansas under special assignment, and on August 30, upon the application of the Board in this cause, he enjoined further proceedings by the

plaintiff in the state court litigation. His decision was appealed, and he was affirmed. Thomason v. Cooper, supra.

The 1957-58 school year was due to commence on September 3, 1957, and the Board had arranged to enroll nine Negro students in the formerly all-white Central High School pursuant to the plan. On the night of September 2, however, the Governor of the State of Arkansas announced that in the interest of preserving the public peace and tranquility he had called out units of the Arkansas National Guard and had directed that the white schools be placed "off limits" to Negro students, and that the Negro schools be placed "off limits" to white students. The Board, learning of the Governor's action, requested the nine Negro students not to attempt to enter the school the following day, and on the morning of September 3 the Board applied to Judge Davies for instructions. As a result of that application Judge Davies entered an order on the same day directing the Board to put its plan of integration into operation "forthwith."

On September 4 the Negro students attempted to enter the school but were turned away by the national guardsmen. The next day the Board filed a petition for a temporary suspension of the operation of the plan, which petition upon a hearing by Judge Davies was denied.

On September 9, 1957, Judge Davies entered an order inviting the Government to come into the case as amicus curiae and to commence injunction proceedings against the Governor and his subordinates "to prevent the existing interferences with and obstructions to the carrying out of the orders heretofore entered by this Court in this case." Thereupon the Government intervened, and after a hearing held on September 20, a preliminary injunction was entered restraining the Governor, the Adjutant General of the State of Arkansas, and the Unit Commander of the guardsmen on duty from "(a) obstructing or preventing, by means of the Arkansas National Guard, or otherwise,

Negro students eligible under said plan of school integration to attend the Little Rock Central High School, from attending said school or (b) from threatening or coercing said students not to attend said school or (c) from obstructing or interfering in any way with the carrying out and effectuation of this Court's orders of August 28, 1956 and September 3, 1957, in this case, or (d) from otherwise obstructing or interfering with the constitutional right of said Negro children to attend said school." See Aaron v. Cooper, DC, Ark., 156 F. Supp. 220.

The Governor obeyed the order entering the temporary injunction just mentioned, while at the same time prosecuting an appeal therefrom and withdrew the national guardsmen. Judge Davies' decision in question was affirmed by the Court of Appeals on April 28 of the current year. Faubus et al v. United States et al., 8 Cir., _____ F2d _____. On Monday, September 23, the Negro students entered Central High School under the protection of the police department of the City of Little Rock and of certain members of the Arkansas State Police. A large and demonstrating crowd, however, had gathered around Central High School, which crowd the officers on duty could hardly control, and they advised the Superintendent to remove the Negro children from the school which was done.

A short time later the Negro students were readmitted to the school under the protection of combat troops of the regular United States Army which the President sent into Little Rock for that purpose, and eight of these students remained enrolled for the balance of the school year which closed on May 28, 1958. During the entire school year the grounds and interior of Central High School were patrolled first by regular army troops and later by federalized national guardsmen.

The petition for a stay with which we are concerned was originally filed by the Board on February 20, 1958; that pleading, reduced to essentials, alleged that federalized national guardsmen were on duty at the school and were preventing interference with the attendance of the Negro students, that a small group of students with the encouragement of certain adults had created almost daily incidents making it difficult for pupils to learn and teachers to teach, that there existed unrest among students, parents and teachers which likewise made it difficult for the school district to maintain a satisfactory educational program, and that educational standards were being impaired. The prayer of the original petition was that "the plan of integration heretofore ordered by this Court be realistically reconsidered in the light of existing conditions and that in the interest of all pupils the beginning date of integration be postponed until such time as the concept of 'all deliberate speed' can be clearly defined and effective legal procedures can be obtained which will enable the District to integrate without impairment of the quality of education it is capable of providing under normal conditions." On February 25, 1958, the plaintiffs filed a motion to dismiss the petition on the ground that it stated no claim upon which relief could be granted, and on the further ground that it stated no claim for relief from a judgment or order cognizable under Rule 60(b) of the Federal Rules of Civil Procedure.

Although this case had never been on our docket, due to the fact that at the time there was no other judge regularly commissioned in the Eastern District of Arkansas, and in view of the public interest involved in the Board's petition, the Honorable Archibald K. Gardner, Chief Judge of the Court of Appeals for this Circuit, on April 18, 1958, designated us to hear and determine the issues presented by the petition, "and to do such work as may be necessary and incidental to acting upon said petition." This special assignment was made to run

from April 21, 1958, to September 1, 1958, both dates inclusive.

On April 28, 1958, we held a preliminary proceeding in this matter, in the course of which we read a prepared statement, which, among other things, directed that the original petition be amended so as to disclose whether the Board desired time to reconsider the plan, or whether it simply wanted a "moratorium" or a "cooling off period," and also so as to give a reasonable indication of how long a postponement the Board felt that it needed at this time.

Subsequently, the Board filed a substituted petition containing allegations more or less similar to those of its original pleading, and praying that a stay be granted until January, 1961. In that connection, it was alleged: "Petitioners cannot with certainty determine how long operations under the plan should be postponed, but in the light of existing conditions hereinabove mentioned and in the light of conditions as they will probably exist in the foreseeable future, they are of the opinion that a suspension of operations under the plan until January, 1961 is reasonable and advisable."

The plaintiffs filed a response to the substituted petition wherein they renewed their motion to dismiss, on which motion ruling had been reserved at the preliminary proceeding above referred to, and in which they denied that the Board is entitled to the relief sought. In addition, on behalf of the Negro students admitted to the school in September, 1957, it was alleged that their rights to finish their high school education in Central High School have become vested, and that "defendants are without right at law or equity to frustrate said vested rights in this or any other proceeding."

When this matter was called for trial on the morning of June 3, the Board, without objection on the part of the plaintiffs, filed an amendment to the substituted petition alleging more definitely the respects in which it contends that the educational program at Central

High School has been impaired due to the alleged situation at Little Rock. It is said in the amendment that the educational program has suffered and will continue to suffer; that the Board has had to divert funds in an attempt to solve the problems with which it has been faced, which funds would otherwise have been used for normal educational purposes such as teachers' salaries, plant maintenance and new construction; that under the conditions that existed at Central High School during the school year just past, and under the conditions likely to exist in the foreseeable future, both the Negro and the white students have suffered and will continue to suffer unless the requested delay is granted; and that the problems caused by operation under the court orders that have been mentioned have taken and will continue to take "an undue amount of time, talent and energy of school personnel, all of which has been and will continue to be a severe strain on said personnel, and which has prevented and will continue to prevent said personnel from performing many of their regular duties."

While the plaintiffs have not filed any formal pleading directed at the amendment to the substituted petition, we shall treat the amendment as traversed, and will also consider that the plaintiffs' motion to dismiss extends to the same, as well as to the other pleadings filed by the Board.

It is the theory of the Board, reflected in its pleadings, evidence and briefs, that the plan of integration which it adopted in 1955, upon the assumption that it would be acceptable and workable, has broken down under the pressure of public opposition, which opposition has manifested itself in a number of ways hereinafter mentioned, and that as a result the educational program at Central High School has been seriously impaired, that there will be no change in conditions between now and the time that school opens again in September, 1958, and that if the prayer for relief is not granted the situation with which the Board will be confronted in

September will be as bad as, if not worse than the one under which it has labored during the past school year, and that it is in the public interest that the requested delay be granted.

While the plaintiffs deny, at least formally, that the educational standards at Central High School have been impaired, it seems to us that their fundamental position is, that even if it be assumed that everything that the Board alleges is true from a factual standpoint, nevertheless the Board's difficulties stem entirely from popular disagreement with the principle of integration, which disagreement does not form a proper legal basis for permitting the Board to postpone the operation of its plan. This contention is summarized in the plaintiffs' pre-trial brief in the following language: "The defendants' case for suspension of the injunctions is predicated upon problems allegedly created by community oppositions to continued nonsegregation at Central High School. Such an approach is without legal foundation."

In addition, the plaintiffs contend that the Board does not actually stand in need of any relief. As touching the situation inside the school, they urge that the Board could have solved its problems during the year just past had it taken a firmer disciplinary stand, and that if such a stand is taken this fall the problems can still be solved; and they contend still further that if a stay should be granted it will be more difficult to put the plan back into effect in 1961 than it would be for the Board to persevere with it this coming year. With regard to the situation outside the school, the plaintiffs argue that the Board's proper remedy is the commencement of criminal proceedings or the seeking of injunctive relief against the persons responsible for the disorders.

Those conflicting theories present two basic questions for our decision, namely, whether or not this Court, sitting as a court of equity, has the power to grant the relief sought, and, if so, whether or not the Board has made a showing sufficient to justify the granting of that relief. In that connection we might call attention to the fact

that in the prepared statement that we read at the preliminary proceeding held on April 28 we took occasion to say, among other things: "....let me make it clear that if the Board makes a case for relief under the law and the evidence, then appropriate relief will be granted. But, on the other hand, if the Board fails to make a case, either from a legal or a factual standpoint, its petition will have to be denied."

As to the first question, there can be no doubt that this Court has "jurisdiction," in the sense of "power to act," to grant the relief sought. Such power is to be found in Rule 60(b) (5) and (6) authorizing a federal court to grant relief from a judgment when it is no longer equitable for the same to have prospective application, or for "any other reason justifying relief from the operation of the judgment"; and in their response to the substituted petition the plaintiffs admit: "...that Rule 60 (b)(5) and (6) empowers the Court to grant, upon such terms as are just, relief from a judgment or order."

Aside from Rule 60(b), jurisdiction to grant relief here may be predicated upon the inherent power of a court of equity with respect to its injunctive decrees. United States v. Swift & Co., 286 U.S. 106, 114-115; Tobin v. Little Rock Packing Co.,DC, Ark. 104 F.Supp. 527, aff'd., 8 Cir., 202 F2d 234, cert. den. 346 U.S. 832. And, more cogently, the existence of such jurisdiction in a case of this kind appears to have been specifically recognized in the second Brown opinion wherein it was said:

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date..." Brown v. Board of Education, supra, 349 U.S. at 300, emphasis supplied.

To hold that once a plan of integration has been approved and ordered into effect by a federal court, all of the details of that plan, including the commencing date and the rate of progress toward complete elimination of compulsory segregation, become immutably fixed would negate the concept of equity's "practical flexibility" in shaping its remedies, and would be an unwarranted limitation upon its "facility for adjusting and reconciling public and private needs." And it should be noted in this connection that although in the Arlington County, Virginia case the district judge ordered the Board there involved to commence integration by a certain time and to complete it by a certain time, he expressly reserved the power "to enlarge, reduce, or otherwise modify the provisions of said injunction or of this decree." Thompson et al v. County School Board of Arlington County, Va., DC, Va., 144 F.Supp. 239, 241, aff'd., 4 Cir., 240 F2d 59, cert. den., 353 U.S. 910.

As we approach the second question in this case, it should first be said that it cannot be seriously contended that the Board did not make a "prompt and reasonable start" toward a transition from a racially segregated to a racially integrated public school system. As stated, the Board announced its intention to move in that direction a very few days after the first Brown decision, and it actually announced its plan some days before the second and implementing decision in that litigation; and, in spite of the difficulties that have been outlined, it put the plan into operation and maintained it during the past school year. Hence the real problem is whether or not the Board now needs more time to

make the transition "in an effective manner," and whether or not the granting of such time "is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date."

At the hearing on the petition, which extended from June 3 into the afternoon of June 5, the Board called to the stand its president, Mr. Wayne Upton, its Superintendent of Schools, Mr. Virgil T. Blossom, certain members of the administrative staff of the high school, and certain class-room teachers. While the attorneys for the plaintiffs diligently cross-examined the main witnesses called by the Board, they did not put on any proof of their own tending to contradict the factual aspects of the testimony of the Board's witnesses, but confined their evidence to the testimony of two expert witnesses, namely, Dr. Virgil M. Rogers, Dean of the School of Education of Syracuse University, Syracuse, New York, and Dr. David G. Salten, Superintendent of Schools at Long Beach, Long Island, New York. Those witnesses gave it as their opinion in general that to grant the petition would be unnecessary and undesirable, and that the Board should keep its plan in operation while using stricter disciplinary procedures against those in the school who might become involved in racial incidents such as were described by the Board's witnesses; and they also were of the opinion that stricter procedures should have been used during the past school session.

From the practically undisputed testimony of the Board's witnesses we find that although the continued attendance of the Negro students at Central High School was achieved throughout the 1957-58 school year by the physical presence of federal troops, including federalized national guardsmen, nevertheless on account of popular opposition to integration the year was marked by repeated incidents of more or less serious violence directed against the Negro students and their property, by numerous bomb threats directed at the school, by a number of nuisance fires started inside the school, by desecration of school property, and by the circulation of cards,

We further find that if the attendance of Negro students at Central High School is to be maintained during the next school year, the Board will have to have military assistance or its equivalent, and it is financially unable to bear the expense of hiring a sufficient number of guards to control the situation. It cannot be expected that the Little Rock Police Department will be in a position to detail enough men to afford the necessary protection.

As to the need for troops when school re-convenes, Superintendent Blossom stated that he saw nothing to indicate that conditions at the school would be different in September than they were throughout the past year, and that as a school administrator he saw no lessening of responsibility for the safety of everyone concerned; he said, "We have that responsibility just as greatly today as we did yesterday, and we will have it tomorrow." And when asked whether or not it would be necessary to have the same guards and civilian security employees in the school in September, he replied: "As I said before, I have no reason to anticipate anything different from what we had. If we take what history teaches us, I think that will be a natural conclusion."

Now, while troops can disperse crowds, and can keep the Negro students physically within the school, and while it is possible that if troops were deployed in sufficient numbers all over the school vandalism could be checked, the presence of troops cannot reduce or eliminate racial tensions, or create a climate that is conducive to education; on the contrary, the presence of armed soldiers in a school is, as has been shown here, disrupting to the educational process. As to the importance of a proper educational climate, Mr. Blossom said: "...any educational program needs to have certain things present in the atmosphere, such as a climate where children can be taught and teachers can teach. We have contended that that condition has not existed at Central High School, that it is not likely to exist next year. Now, in putting on any educational program, the proper conditions are about as necessary

leaflets and circulars designed to intensify opposition to integration. Mr. J.O. Powell, the vice-principal for boys at the high school, summed the situation up by saying that the first year of operation under the plan was one of "chaos, bedlam and turmoil" from the beginning.

The incidents and other matters just referred to, plus the presence of the troops, which was in and of itself a distracting influence, created throughout the year a situation of tension and unrest among the school administrators, the class-room teachers, the pupils, and the latters' parents, which inevitably had an adverse effect upon the educational program; and we find that said program was seriously impaired, that the orderly administration of the school was practically disrupted, and that educational standards have suffered. We further find that unless a stay is granted, the same situation will prevail when school opens in September, and that the impairment of the educational program and standards will continue and will probably grow worse.

Before discussing further the adverse effect of the events that transpired during the past school year, we desire to point out that the Board and the school administration had no authority over individuals or groups outside the school, and while they undertook to handle and control the situation within the school by the employment of normal disciplinary procedures, they were unable to do so because of the nature and source of the opposition to integration both inside and outside the school.

It is important to realize, as is shown by the evidence, that the racial incidents and vandalism which occurred in Central High School during the past year did not stem from mere lawlessness on the part of the white students in the school, or on the part of the people of Little Rock outside the school; nor did they stem from any malevolent desire on the part of the students or others concerned to bomb the school, or to burn it down, or to injure or persecute as

individuals the nine Negro students in the school. Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years. The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock, that the Brown decisions do not truly represent the law, and that by virtue of the 1956-57 enactments, heretofore outlined, integration in the public schools can be lawfully avoided.

In this connection, the president of the Board, Mr. Upton, testified that between the spring and fall of 1957 there was a marked change in public attitude towards the plan, that persons who had formerly been willing to accept it had changed their minds and had come to the conclusion "that the local School Board had not done all it could do to prevent integration, and that we didn't have to have integration"; and Vice-principal Powell testified that he believed that the white children involved in the incidents "feel that they are morally correct in their attitude and in their opposition," and that such is due to the "cultural patterns and sociological patterns in this community for many years," and that the students who created the incidents felt that it was wrong to integrate the Negro children into Central High School.

With respect to the effects of the 1956 constitutional amendment and initiated acts and of the 1957 statutes, Mr. Blossom testified that those enactments had their effect at Little Rock and throughout the State in stiffening opposition to the plan and in persuading people that there was no necessity for integration at this time.

Mr. Blossom further testified that the opposition to integration and the feeling that it was not required at this time had been greatly strengthened by numerous newspaper articles and advertisements, and by circulars and cards distributed in Little Rock, copies of which were

introduced in evidence. Without prolonging this opinion by undertaking to abstract or quote from individual exhibits, we may say that we agree with Mr. Blossom's appraisal of their effect. Those exhibits in general, condemn the principle of integration; some of them condemn the Board and the Superintendent for alleged precipitateness in adopting the plan, and for their alleged mistreatment of white students during the past year; and many of them emphasize the idea that integration can be avoided by legal, constitutional means.

Regardless of the merits of the sociological and legal views expressed in those exhibits, the conclusion is inescapable that they are shared, in whole or in part, by a majority of the population of Little Rock, representing a cross section of the people of that city. On that point, Mr. Upton was asked in the course of his examination whether or not the people who had raised with him the questions which we have previously mentioned were fairly intelligent people, and he replied that they were, and that they were generally people who recognized him and who knew him. And Mr. Blossom expressed the opinion that the doubts and questions in the minds of many people were honest ones, and that it was his opinion that the great majority of the people of the community, from the contacts he had had with it, do not favor integration.

With further reference to the 1956-57 enactments it should be said that at least some of them are now involved in litigation pending in the state courts and after that litigation is decided by the trial courts, appeals will doubtless be taken to the Supreme Court of Arkansas, which alone can finally and authoritatively construe the same, and can, in the first instance, pass upon their validity; after the Supreme Court of Arkansas has ruled, these matters may well be carried to the Supreme Court of the United States for final review, all of which will take time. On that subject Mr. Blossom testified:

"If you take the suits that are now pendi and recognize the ones that are now being proposed, and none of them have been cleared out, the opinion that I would have would be that there are many, many months ahead before there will be any decision on them, to where there is a clear-cut situation between state and federal law on this problem, and that, in itself, creates this dilemma. You don't know where you are."

Getting back to the effects of the events of the past school year on the educational program at Central High School, we find more specifically that those events have had a serious and adverse impact upon the students themselves, upon the class-room teachers, upon the administrative personnel of the school, and upon the overall school program. In addition, said events have cast a serious financial burden upon the school district, which it has had to meet at the expense of normal educational and maintenance functions.

As far as the students themselves are concerned, we think it obvious that the incidents and conditions that have been described could not have been good for them emotionally; but aside from that, their education has certainly suffered and under existing conditions will continue to suffer, as is shown by the testimony of the class-room teachers called by the Board.

For example, Mr. W. P. Ivey, who has taught mathematics in the Little Rock school district for 34 years and who has been on the faculty of Central High School ever since that school was opened in 1927, testified that the presence of the Negro students created a tension on the part of both students and teachers that was noticeable every day, and that this tension impaired his ability to teach and the receptivity of his students. On cross-examination he stated that the final results obtained by him in his classes were not as good as they had been in prior years, as evidenced by his tests and

also by comparison of the grades made in his classes which included Negro students with the grades made in his classes not attended by any of the Negroes.

Another member of the faculty who described the adverse effect that the presence of the Negro students, and all that went with it, had on educational standards was Mrs. Govie Griffin, who has taught chemistry for 13 terms at Central. The subject that she teaches is an elective course, taken principally by those who plan to go to college and who presumably are interested in mastering the subject. It was her observation that the presence of the troops in the school, their standing outside of class-room doors during recitations, and their actions in walking up and down the halls, occasionally dropping their clubs, all had a disturbing effect on pupils and teachers alike. Due to that situation and the prevailing tension and unrest, the amount of subject matter that she was able to offer in her chemistry course was so seriously curtailed that she had to request that standard achievement tests usually given at the close of the school year be not given; and her request was granted. She said in this regard: "In the past we have always given standardized tests at the close of the school year, and the pupils have always been far above the national norm. This year I requested they not be given the test in all fairness to the students because we had not covered the material we had in the past years."

As to the effect of the events of the past session on the classroom teachers and administrative staff personally, the observations and experiences of Mrs. Elizabeth Huckaby, vice-principal for girls, who has been at Central since 1930, an informative. She stated that normally in addition to her administrative duties she taught two English classes, but that during the past year she has been compelled to give up those classes and to devote all of her time to administrative duties, and that from 75 to 90 percent of her time was devoted to problems created by integration. These problems, and the unrest

and tension in the school had an adverse effect upon her nerves and physical well being. She testified that apprehension over existing conditions caused her to lose sleep, which problem she had never had before; that she had no social life because of her exhaustion at the end of each day, and that on week ends she and her husband would go to the country and relax, and that by noon on Sunday she "would begin to revive enough to face the next week." Mrs. Huckaby also observed that other teachers were likewise suffering ill effects; she stated that some would come to her trembling, and that others would come weeping because of the events that were transpiring, and she pointed out in this connection that teachers in the main are not accustomed to violence.

Mrs. Huckaby's testimony as to the effect of the integration problems on the class-room teachers was corroborated by that of Mrs. Margaret Ryman, a mathematics teacher, and of Mrs. Shirley Stancil, a guidance counsellor, and likewise by the testimony of Mr. Blossom. The latter stated that one of his greatest concerns during the year was the health and welfare of the teachers, and that he felt very strongly that the teachers were under more strain than the students since they had upon their shoulders the responsibility for the physical welfare and educational progress of every student in the school, and that "they took that responsibility to heart and it affected many of them and that was reflected in many of the conferences I had with them as individuals."

The tension and strain to which the administrative staff were subjected did not terminate with the close of the school day. Mr. Powell stated that on a typically difficult day his phone would commence ringing as soon as he got home from school, the calls coming from people desiring various types of information; that he has spent as much as three hours on certain days "answering the telephone, or in making calls or dodging calls;" that he has had to work long hours during the evenings and nights on many occasions, and that his social life and normal rest had been interfered with

to a definite extent during the entire school year.

Along the same lines Mr. O. W. Romine, Director of School Plant Services for the entire school district, testified that under normal conditions he worked from eight in the morning until five in the afternoon, and that after hours' duty was rare. During the past year, however, he had been on call 24 hours a day, and had received hundreds of calls at all hours of the night; on many occasions when his telephone had rung, and he had picked up the receiver, he found no one on the line. At one stage of the troubles he was away from home so much at night that he did not see his youngest child for four days, since he would get in at night after the child had gone to bed and would be gone in the morning before the child awoke.

The subject matter of some of the exhibits introduced by the Board consisted, in part at least, of personal attacks on the Board members and the administrative staff, which could not have failed to have reacted unfavorably upon them personally. In addition, Mr. Blossom was the recipient of many threats against his physical safety and well being. Of the Board members, Mr. Upton, at least, was subjected to much personal harassment, mainly by telephone calls, and to such an extent that he had to take an unlisted number.

It is too clear to require discussion that the experiences of the classroom teachers and of the administrative staff must have produced at least some loss of personal efficiency on their part, with corresponding damage to the educational program. More serious, however, is the fact that it has been necessary to divert the time and talents of the trained administrative personnel from their normal duties in dealing with the many complex problems involved in the operation of a high school like Central to purely disciplinary matters, and we find, as alleged by the Board, that the efforts of the administrative staff to cope with the integration problems with which they have been confronted have consumed and undue amount of

their time and energy; and we agree with Mr. Blossom in his statement that the diversion of administrative skills and energies to discipline maintenance during the past year may have been one of the highest prices that the school district has had to pay. At least one serious result of such diversion is that the curriculum planning which had been previously emphasized at Central, has been seriously impeded. In addition, the building program has been held up although the District's enrollment is rapidly increasing, with an accompanying need for more facilities.

As stated, the evidence further showed that the school district has had to shoulder substantial financial burdens on account of integration, and that this has been at the expense of other school programs. Mr. Romine testified, for example, that it was necessary to employ five additional night watchmen at the high school and that the cost for this item alone was between nine and ten thousand dollars; further, when it became necessary to relieve Mr. Powell and Mrs. Huckaby of their teaching duties so that they could devote their energies to the administrative problems with which the school was confronted, substitutes had to be hired to take their places in the classrooms. Moreover, the Board had to spend money to repair the damages to the school property, and to replace locks which had to be cut off of lockers during bomb searches; on that point Mr. Romine said that at one time he saw a bushel basket full of cut locks, and that it cost the Board $1.25 apiece to replace them. Mr. Romine further testified that the overall maintenance budget for all the schools in the district for the fiscal year ending June 30 of the current year was $123,000, that by January of this year he saw that unless something was done that budget would be overrun by approximately $17,000. In order to stay within the budget it was necessary he said to dismiss the paint crew of five men, thus saving not only their wages but also the cost of the paint they would have used, and to forego some normal maintenance work on the school properties.

Mr. Blossom testified that the funds of the Little Rock School District are not unlimited, that in fact the district is underfinanced, and the annual expenditure per child is approximately $100 below the national average. He further pointed out that whenever district funds have to be diverted to meet unusual problems as they were during the past year, the district suffers harm, and that such diversions may mean that less teachers can be employed, and less instructional equipment purchased.

Looking toward the approaching school term it was the consensus of opinion on the part of the Board's witnesses, and we find, that there has been no softening of the public attitude in Little Rock toward integration, and we further find, as heretofore stated, that unless some relief is granted the Board the conditions that will prevail in Central High School during the 1958-59 school year will be as bad as they were during 1957-58, and will probably deteriorate still further. One reason for this conclusion is that, according to the evidence, Central High School operated last year largely on a momentum that had been built up during past years, and that momentum is running down. Any efficient organization, manned by skilled personnel, as was Central High School in September, 1957, can operate for a time on its momentum even in the face of severe pressure; but with such pressure a time comes when that momentum is lost, and when that happens then, unless the pressure is removed, the organization breaks down. We are convinced that such point is being approached at Central. Mr. Blossom stated in that connection that the strain of the past year had already taken its toll, and would be felt still further when school opens this fall, and that starting into another year would be entirely different from the commencing of school last September. In this he was corroborated by Mrs. Huckaby.

as the proper tools and the proper teachers." Furthermore, when Mrs. Huckaby was asked on cross-examination if she did not think that the Board, the school administration, the city authorities, and the military could carefully plan the running of the high school, she replied that she did not relish the idea of having those particular groups always involved in her educational system, because as an educator such was foreign to her experience.

As has been said, there can be no question that the Board made a prompt and reasonable start toward compliance with the principles laid down in the Brown cases; thereafter, it put its plan into operation and has adhered to it in good faith in the face of great difficulties. Now, it has come here seeking relief only after it has been confronted with what is, from an educational standpoint, an intolerable situation, and it does not ask for an abandonment of its plan nor does it attempt to obtain an indefinite postponement. It is simply requesting a tactical delay. We are convinced that in seeking this delay the Board is still acting in good faith, and, upon the showing that has been made, we are satisfied that the Board needs more time to carry out its plan in an "effective manner," and that to grant the instant petition is in the public interest, and is consistent with good faith compliance, at the earliest practicable date, with the principles above mentioned. In reaching this conclusion we are not unmindful of the admonition of the Supreme Court that the vitality of those principles "cannot be allowed to yield simply because of disagreement with them;" here, however, as pointed out by the Board in its final brief, the opposition to integration in Little Rock is more than a mere mental attitude; it has manifested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted.

We have seen that the Supreme Court said in the second Brown decision that the transition of a formerly segregated school to a school

free from compulsory segregation should be carried out in an "effective manner," and that such a transition is in the public interest. In our estimation a transition which impairs or disrupts educational programs and standards, and which will continue to do so, is not in the public interest, but, on the other hand, inflicts irreparable harm upon all of the students concerned, regardless of race. Where, as here, such a transition is being undertaken under the compulsive effects of a federal court order, a refusal to modify such order so as to ameliorate the situation would in our opinion under the circumstances here present be inequitable, if not arbitrary as well.

That the Supreme Court recognized the necessity of maintaining educational standards is evidenced by the following language in the first Brown decision.

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education..." (Brown v. Board of Education, supra, 347 U.S. at 493).

And Judge Miller, in his original opinion in this case, pointed out that the Board was undertaking not only to work out a program of integration, but also to preserve and improve educational standards; and he took occasion to say: "(The Board) must consider the personal rights of all qualified persons to be admitted to the free public schools as soon as practicable on a nondiscriminatory basis. The public interest must be considered along with all the facts and conditions prevalent in the school district. Educational standards must not be lowered..." (Aaron v. Cooper, supra, 143 F. Supp. at 864-865.) Furthermore, the Court of Appeals in its affirming opinion said: "...The schools of Little Rock have been on a completely segregated basis since their creation in 1870. That fact, plus local

problems as to facilities, teacher personnel, the creation of teachable groups, the establishment of the proper curriculum in desegregated schools and at the same time the maintenance of standards of quality in an educational program may make the situation at Little Rock,Arkansas, a problem that is entirely different from that in many other places." Aaron v. Cooper, supra, 243 F2d at 364.

The importance of maintaining educational standards today is certainly no less than it has been in prior years; in fact it is more urgent. And while the Negro students at Little Rock have a personal interest in being admitted to the public schools on a non-discriminatory basis as soon as practicable, that interest is only one factor of the equation, and must be balanced against the public interest, including the interest of all students and potential students in the district, in having a smoothly functioning educational system capable of furnishing the type of education that is necessary not only for successful living but also for the very survival of our nation and its institutions. There is also another public interest involved, namely, that of eliminating, or at least ameliorating, the unfortunate racial strife and tension which existed in Little Rock during the past year and still exists there.

When the interests involved here are balanced, it is our opinion, in view of the situation that has prevailed and will in the foreseeable future continue to prevail at Central High School under existing conditions, the personal and immediate interests of the Negro students affected, must yield temporarily to the larger interests of both races.

While we do not seek at this time to authoritatively define the term "all deliberate speed" employed by the Supreme Court in the Brown case,it does seem to us that the term is a relative one, dependent upon varying facts and circumstances in different localities.

and that what might be "deliberate speed" under one set of circumstances could constitute headlong haste under another. And it further appears to us that said term involves the idea of a progress toward the elimination of compulsory segregation that is consistent with the maintenance of sound educational standards and a salutary educational atmosphere, neither of which can be maintained at Central High School if the Board is compelled to keep its plan in operation at this time. After all, the function of any public school system, whether integrated or not, is to educate people.

It is important to realize that to grant the stay requested by the Board will not deprive any Negro student of a good high school education. In 1957 the completely new and up-to-date Horace Mann High School for Negroes was put into operation, and in that school, apart from any question of integration, the Negro students can receive an education equal to that provided in Central High School. As to the Horace Mann School, Mr. Blossom testified that, relatively speaking, the quality of education in that school, measured by any desired indicia, whether facilities, teacher preparation, teaching aids, or instructional supplies, is "on a par with any other school." He further stated with reference to the past session: "The truth of the business is it was better than most high schools in this State, white or colored." He also testified that he felt that the Negro students could in 1958 "be better educated in another manner without them being hurt."

The granting of the Board's petition does not, in our estimation, constitute a yielding to unlawful force or violence, but is simply an exercise of our equitable discretion and good judgment so as to allow a breathing spell in Little Rock, while at the same time preserving educational standards at Central High School.

At one point in his testimony Mr. Blossom stated, and we agree with him, that a tactical delay is not the same as a surrender; and the delay here sought is not a vain thing or a mere frustration of the plaintiffs' rights. In the first place, the delay, in and of itself may well be of material value to the Board in carrying out its

announced purposes. In the two and one-half year period involved tempers will have a chance to cool down, emotions may subside to some extent, and there may also be changes in some of the personalities involved in the dispute. Of more significance, however, is the fact that the delay will afford time for the completion of the pending litigation in the state courts and for an appraisal of the results of that litigation. Obviously, should the state legislation challenged in that litigation be upheld as valid, such a result might well have a profound effect on the situation at Little Rock. On the other hand, should that legislation be held unconstitutional, and particularly if such a result should be reached by the state courts, the people of Little Rock might be much more willing to acquiesce in integration as contemplated by the plan.

What has just been said likewise indicates that the length of the proposed stay is reasonable, and we so find. On this point we agree with the opinion expressed by Mr. Upton, who is an experienced lawyer, that it will take at least two years for the litigation above referred to to be finally terminated. In addition to that, considering the nature of the problem, two and one-half years is not a very long period of time; and a very short delay would serve no useful purpose. Added to those considerations is the fact that the Board and the Superintendent, who are familiar with the problem and whose responsibility it was in the first instance to decide how long a stay was desired, after considering the various factors involved determined on a two and one-half year period, and deemed it desirable to resume the plan at mid-term of the 1960-61 school year. And we do not believe that under the circumstances the Court should disturb their judgment, even if it were inclined to do so.

In their brief in support of their motion to dismiss the

original petition the plaintiffs cited a number of cases standing[3] for the proposition that an injunction may not be dissolved or modified in the absence of a showing of unforeseeable changes in conditions which have created an exceptional situation. While none of those cases involved any problem of race relations or school integration, we do not quarrel with the general rule laid down therein, and the Board in its brief in opposition to the motion concedes "that the situation must be 'extraordinary' and that the circumstances must be 'exceptional.'"

Here, however, there has been a very radical change of situation since the former orders of this Court were entered, the occurrence and extent of which were not, to our mind, foreseeable at that time. And the situation with which the Board is now confronted is certainly exceptional and extraordinary if not, indeed, unique, that situation being complicated by the vast amount of publicity that has been given to it.

It must be remembered that when Judge Miller handed down his decision in 1956, the people of Arkansas and the legislature had not adopted the measures that we have mentioned; on the contrary, the 1955 legislature had refused to enact certain similar legislation. And when Judge Davies on September 3, 1957 ordered the Board to put its plan into effect forthwith, and when he denied the Board's

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3. Klapprott v. United States, 335 U.S. 601; Ackermann v. United States, 340 U.S. 193; United States v. Swift & Co., supra, 286 U.S. 106; Walling v. Harnischfeger Corporation, DC, Wis., 142 F. Supp. 202, aff'd., 7 Cir., 242 F2d 712; John E. Smith's Sons Co. v. Lattimer Foundry & Machine Co., 3 Cir., 239 F2d 815; Federal Deposit Ins. Corp. v. Alker, 3 Cir., 234 F2d 113; Smith v. Kincaid, 5 Cir., 232 F2d 306; Morse-Starrett Products Corp. v. Steccone, 9 Cir., 205 F2d 244; Elgin National Watch Co. v. Barrett, 5 Cir., 213 F2d 776; Bigelow v. Twentieth Century-Fox Film Corp., 7 Cir., 183 F2d 60; Coca Cola Bottling Co. v. Standard Bottling Co., 10 Cir., 138 F2d 788; United States v. Besser Manufacturing Co., DC, Mich. 125 F. Supp. 710; Sunbeam Corporation v. Charles Appliances, DC, N.Y., 119 F. Supp. 492.

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pplication for a stay on September 7, and when he entered his order f September 20 enjoining the Governor from further interferring ith the operation of the plan, the Negro students had not begun ttending classes at the school, federal soldiers had not appeared pon the scene, repeated racial incidents had not occurred, the eachers had not been frightened and demoralized, and educational tandards had not been impaired. All of this has taken place since he final order entered by Judge Davies, and we do not believe that e foresaw the result that has come about. On the contrary, in his indings of fact and conclusions of law in connection with the in- unction against the Governor he took occasion to refer to the his- ory of peaceful race relations in Little Rock, and to state that rior to the calling out of the Guard the "faculty and the white tudent body at Central High School were prepared to accept the 9 olored children as fellow students." Aaron v. Cooper, DC, Ark., 56 F. Supp. at 224.

As we have said, the fundamental position of the plaintiffs in pposing the petition appears to be that popular opposition to the lan, resulting in obstructions to its orderly operation, does not orm any legal basis for affording the Board any relief in this case. n support of that argument counsel for the plaintiffs have cited he following cases: Allen v. County School Board of Prince Edward ounty, Va., 4 Cir., 249 F2d 462, cert. den. 2 L. Ed 2d 530; Orleans arish School Board v. Bush, 5 Cir., 242 F2d 156, cert. den. 354 .S. 921; Jackson v. Rawdon, 5 Cir., 235 F2d 93, cert. den., 352 .S. 925; Mitthell v. Pollock, DC, Ky., 1 Race Rel. L. Rep. 1038; chool Board of Charlottesville, Va. v. Allen, 4 Cir., 240 F2d 59, ert. den. 353 U.S. 910; and School Board of Newport News, Va. v. tkins, 4 Cir., 246 F2d 325, cert. den., 355 U.S. 855.

Those cases unquestionably hold that a school board is not ustified in failing to make a prompt and reasonable start toward he elimination of compulsory segregation merely because of popular pposition to such a step. But none of them has involved a situation

like the instant one where a board has made a prompt and reasonable start, and has actually put its plan into operation, only to find it breakdown in practice with a consequent impairment of educational standards and demoralization of the faculty and student body.

It is one thing to say that a school board must make a start in the direction of integration without regard to public feelings on the subject, as Judge Hutcheson said in Jackson v. Rawdon, supra; but it is quite another thing to say that when a school board has had the experiences with its plan which the Little Rock Board has had, and when, after observing the results of that plan in operation, it comes into federal court seeking not to abandon the plan or to lay it aside indefinitely, but merely a moratorium, the court must close its eyes and ears to the practical problem with which such board is confronted. Such a judicial attitude would be most unrealistic.

If popular feelings and attitudes are utterly and at all times irrelevant to the question under consideration, the Court of Appeals in affirming Judge Miller in this case would hardly have stopped to point out that the Little Rock schools had been segregated for over 80 years; nor would there have been any occasion for the Court of Appeals to say in the New Orleans case that once a school board has accepted the principle laid down in the Brown decisions, it may well be entitled to "time for such reasonable steps in the process of desegregation as appears to be helpful in avoiding unseemly confusion and turmoil." Orleans Parish School Board v. Bush, supra., 5 Cir., 242 F2d at 166.

Plaintiffs have also cited Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579; Exparte Endo, 323 U.S. 283; Morgan v. Virginia, 328 U. S. 373; and City of Birmingham v. Monk, 5 Cir., 185 F2d 859, cert. den., 341 U.S. 940. Those cases hold that ordinarily enforcement of individual constitutional rights will not be delayed because of the public interests opposed to them, and that the State cannot

deprive one of a constitutional right through the exercise of the police power. None of those cases, however, was a school integration case, and, as has been pointed out, the second Brown decision itself recognizes the propriety of delay in school integration under proper circumstances.

In the instant case it is not denied that under the Brown decisions the Negro students in the Little Rock District have a constitutional right not to be excluded from any of the public schools on account of race; but the Board has convincingly shown that the time for the enjoyment of that right has not yet come. That showing applies to the Negro students who were in the school last year as well as to others. While the plaintiffs contend that the rights of the students last mentioned have become vested, no authority in support of that proposition has been cited to us, and we know of no such authority, and we do not believe that such contention can be sustained.

In support of their argument that if the Board had used sufficiently firm disciplinary measures it could have controlled the situation within the school, and that by such measures it can re-establish control this coming year, the plaintiffs called to the stand the two New York educators heretofore mentioned, and their opinion evidence was in line with the plaintiffs' contentions. On the other hand, the testimony of Mr. Blossom and of Mr. Upton, was to the effect that the Board had diligently sought to preserve discipline, that it had expelled a few students and had suspended others for various periods of time, that it had undertaken to consider each case on its own merits and the effect of the action to be taken not only upon the individual child concerned but also upon the other

students in the school. It was the opinion of those witnesses that in view of the unusual situation with which they were confronted and of the source and nature of the opposition with which they were faced conditions would have been made worse rather than better by the employment of harsh disciplinary measures such as mass expulsions, and that the course that had been in fact pursued was the best possible one under the existing circumstances.

While Dr. Rogers and Dr. Salten are doubtless well qualified to express opinions as to how school matters should be handled in areas of the country with which they are familiar and in which they have had experience, neither of those gentlemen has had any public school administrative experience in the South, or any personal familiarity with the Little Rock situation; nor has either of them ever had any experience with the problems involved in the transition from segregation to integration in a state where the former has been the accepted and traditional mode of life of the people and where its existence in the public schools has had the sanction of law for so long as those schools have existed. As regards Dr. Rogers in particular, his qualifications to speak on this subject were seriously impaired, in our eyes, by his suggestion that members of the student body at Central High School might have been used, in effect, as spies upon other students there. In view of these limitations upon the qualifications of the plaintiffs' witnesses, we cannot accept their opinions in preference to that of Mr. Blossom, who is also an expert, and who formed his opinion on the ground and has based it upon his own intimate experience with the problem.

It is true that the views of Vice-principal Powell coincide with the opinions of the plaintiffs' experts, ss far as the situation inside the school is concerned; but it must be remembered that Mr. Powell had no ultimate disciplinary authority and no responsibility for any matters of overall policy; he was a subordinate employee, and it was

not shown what qualifications, if any, he possesses as an expert in public school administration. He testified that he graduated from Central High School in 1940, that he was employed at the school in an undisclosed capacity in 1952, and that he has been vice-principal for boys for the past three years. His training and experience between 1940 and 1952 were not brought out in the evidence. It is also interesting to note in this connection that Mr. Powell's counterpart, Mrs. Huckaby, did not feel that the employment of stern disciplinary measures was the key to the problem. Actually, it occurs to us that Mr. Powell may well have been so close to the situation in all of its personally unpleasant aspects, that he has to some degree lost his sense of perspective in the matter.

In addition to all of the foregoing, it is well to keep in mind that the duty of maintaining discipline in the schools and of deciding what disciplinary steps should be taken is primarily the function of the school administration, and not that of the Court; and we would certainly be unwilling to substitute our judgment as to what should have been done for that of the Board in the absence of a showing that the Board had erred to such an extent as to indicate an absence of good faith on its part. There has been no such showing here.

Relative to interference from outside the school, the plaintiffs urge that the Board should have either instituted criminal prosecutions against the persons responsible, or that it should have applied for injunctive relief, as was done in the Hoxie, Arkansas, and Clinton, Tennessee, cases. See Hoxie School District No. 46 of Lawrence County v. Brewer, DC, Ark., 137 F. Supp. 364, aff'd., 8 Cir., 238 F2d 91; and Kasper v. Brittain, 6 Cir., 245 F2d 92, cert. den., 2 L. Ed2d 46. In answer to that argument Mr. Blossom testified, and he was corroborated by Mr. Upton, that the Board had determined as a

matter of judgement not to resort to criminal prosecutions or to seek injunctive relief; that it was not the function of the Board to prosecute people or to seek injunctions but to run a school system, and that it had already had all of the litigation that it wanted and was not anxious for any more.

We think that the Board acted within its competency in coming to that conclusion, and we do not think that its failure to commence criminal actions or to seek injunctive relief should militate against its present petition. In the first place, the Board is not charged with the duty of commencing criminal prosecutions or of enforcing the criminal laws of the State. Secondly, by reason of the nature, source and extent of the opposition to integration in Little Rock, actions by the Board looking toward criminal prosecutions or injunctions might have aggravated rather than eased the situation. Moreover, the Board might have had a good deal of difficulty in identifying the persons causing the trouble or in establishing that their conduct constituted crimes or was of such quality as would justify the granting of injunctive relief.

As far as the Hoxie and Clinton cases are concerned, Mr. Blossom testified, and we agree, that the situation at neither of those places was comparable to the situation that has existed and now exists in Little Rock. Both Hoxie and Clinton are much smaller places than Little Rock; hence the procedures followed in the former places might not be effective in the latter.

As an illustration of the differences in situation just mentioned, attention is called to the fact that Judge Reeves' opinion in the Hoxie case discloses that the total integrated student body at Hoxie was 1025, of which only 25 students were Negroes, whereas Judge Miller's opinion in this case shows that the percentage of Negroes to whites in the high school grades at Little Rock, as of May, 1956,

was .229, such percentage in the junior high grades was .246, and in the elementary grades .262, the overall percentage being .252. Moreover, Judge Reeves' opinion also makes clear that the educational facilities for Negroes at Hoxie were by no means comparable to those available to the white students, which is not the case at Little Rock.

As to the Clinton, Tennessee case, we take judicial notice of the fact that Clinton is a small town located in the mountainous country of eastern Tennessee where there are very few Negroes. In addition, the trouble there was readily traceable to one individual from outside the State, as is shown by the evidence in this case and by the opinion of the Court of Appeals in Kasper v. Brittain, supra.

It being in the public interest, including the interest of both white and Negro students at Little Rock, that we have a peaceful interlude for the period mentioned, an order is being entered permitting the Board to suspend the operation of its said plan until mid-semester of the 1960-61 school year, without the Board, or the individual members thereof, or the Superintendent of Schools being considered in contempt of this Court; and the Court retains jurisdiction of this cause for such other and further proceedings as may hereafter become necessary or appropriate.

THIS the 20th day of June, 1958.

/s/
HARRY J. LEMLEY
United States District Judge